87-833

No.

Supreme Court, U.S.
FILED
NOV 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

CHAD S. HAGEN
MASTER SERGEANT, UNITED STATES ARMY,
PETITIONER,

v.

THE UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

JOHN T. EDWARDS
Colonel, Judge Advocate General's Corps (JAGC)
United States Army
Defense Appellate Division
U.S. Army Legal Services Agency
5611 Columbia Pike
Falls Church, Virginia 22041
(202) 756-1807
Counsel of Record

and

RUSSELL S. ESTEY
Major, JAGC
United States Army

SCOTT A. HANCOCK
Captain, JAGC
United States Army

RICHARD J. ANDERSON
Captain, JAGC
United States Army

55 pp

QUESTIONS PRESENTED

I.

Whether petitioner is constitutionally entitled to compel discovery of government evidence relevant to his claim of vindictive and selective prosecution.

II.

Whether a showing of either discriminatory intent or actual vindictiveness is required to raise a defense of vindictive prosecution.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	6
I. PETITIONER PRESENTS THE ISSUE UNRESOLVED IN *WAYTE V. UNITED STATES*, 470 U.S. 598 (1985)	6
II. THE COURT OF MILITARY APPEALS HAS ADOPTED VIEWS OF A MINORITY OF THE COURTS OF APPEALS BY REQUIRING A SUBSTANTIAL SHOWING TO RAISE ISSUES OF PROSECUTORIAL MISCONDUCT	7
III. PETITIONER'S CASE IS A REASONABLE VEHICLE FOR INTERPRETATION OF THE COMPULSORY PROCESS CLAUSE	12
Conclusion	15
Appendix A	1a
Appendix B	19a
Appendix C	26a
Appendix D	28a
Appendix E	30a

TABLE OF AUTHORITIES

Cases:

Batson v. Kentucky, 106 S.Ct. 1712 (1986) 7
Blackledge v. Perry, 417 U.S. 21 (1974) 7, 8, 10
Bordenkircher v. Hayes, 434 U.S. 357 (1978) 7
Burns v. Wilson, 346 U.S. 137 (1953) 11
Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976) 14
Crane v. Kentucky, 106 S.Ct. 2142 (1986) 12

Cases – Continued: Page

Lane v. Lord, 815 F.2d 876 (2d Cir. 1987) 10
Miracle v. Estelle, 592 F.2d 1269 (5th Cir. 1979) . 11
North Carolina v. Pearce, 395 U.S. 711 (1969) ... 7, 8
Pennsylvania v. Ritchie, 107 S.Ct. 989 (1987) ... 12
Rushen v. Spain, 464 U.S. 114 (1983) (per curiam) 14
Solorio v. United States, 107 S.Ct. 2924 (1987) .. 13
Thigpen v. Roberts, 468 U.S. 27 (1984) 7, 8, 10
United States v. Andrews, 633 F.2d 449 (6th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 927 (1981) 8, 10
United States v. Bass, 11 M.J. 545 (A.C.M.R.), *pet. denied*, 11 M.J. 417 (C.M.A. 1981) 12
United States v. Berrigan, 482 F.2d 171 (3d. Cir. 1973) 9
United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974) 9
United States v. Blanchette, 17 M.J. 512 (A.F.C.M.R. 1983), *pet. denied*, 18 M.J. 22 (C.M.A. 1984) 12
United States v. Cammisano, 546 F.2d 238 (8th Cir. 1976) 9
United States v. Carpenter, 1 M.J. 384 (C.M.A. 1976) 8
United States v. Crocker, 788 F.2d 802 (1st Cir. 1986) 10
United States v. Erne, 576 F.2d 212 (9th Cir. 1978) 9
United States v. Ezell, 6 M.J. 307 (C.M.A. 1979) . 11
United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (en banc) 5, 9
United States v. Gallegos-Curiel, 681 F.2d 1164 (9th Cir. 1982) 11
United States v. Garries, 22 M.J. 288 (C.M.A. 1986) 13
United States v. Garwood, 20 M.J. 148 (C.M.A.), *cert. denied*, 474 U.S. 1005 (1985) 12
United States v. Goodwin, 457 U.S. 368 (1982) ... 7, 8

Cases – Continued: Page

United States v. Goodwin, 637 F.2d 250 (4th Cir. 1981), *rev'd on other grounds*, 457 U.S. 368 (1982) 11
United States v. Gordon, 817 F.2d 1538 (11th Cir. 1987) 9
United States v. Guthrie, 789 F.2d 356 (5th Cir. 1986) 11
United States v. Hayes, 24 M.J. 786 (A.C.M.R. 1987) 13
United States v. Hinton, 21 M.J. 267 (C.M.A. 1986) 13
United States v. Jennings, 724 F.2d 436 (5th Cir.), *cert. denied*, 467 U.S. 1227 (1984) 9
United States v. Kerley, 787 F.2d 1147 (7th Cir. 1986) 9
United States v. Kern, 22 M.J. 49 (C.M.A. 1986) . 13
United States v. Krezdorn, 718 F.2d 1360 (5th Cir. 1983) (en banc), *cert. denied*, 465 U.S. 1066 (1984) 6, 8
United States v. Larson, 612 F.2d 1301 (8th Cir.), *cert. denied*, 446 U.S. 936 (1980) 9
United States v. Meyer, 810 F.2d 1242 (D.C. Cir.), *vacated and rehearing en banc ordered*, 816 F.2d 695 (1987) 11
United States v. Moultak, 21 M.J. 822 (N.M.C.M.R. 1985) 12
United States v. Nixon, 418 U.S. 683 (1974) 12
United States v. Oliver, 787 F.2d 124 (3rd Cir. 1986) 11
United States v. Partyka, 561 F.2d 118 (8th Cir. 1977), *cert. denied*, 434 U.S. 1037 (1978) 11
United States v. Reece, 25 M.J. 93 (C.M.A 1987) . 13
United States v. Saade, 652 F.2d 1126 (1st Cir. 1981) 9
United States v. Schmucker, 815 F.2d 413 (6th Cir. 1987) 9
United States v. Steele, 401 F.2d 1148 (9th Cir. 1972) 7

Cases – Continued: Page

United States v. Tatum, 17 M.J. 757 (C.G.C.M.R.), *pet. denied*, 19 M.J. 7 (C.M.A. 1984) 12
United States v. Thomas, 22 M.J. 388 (C.M.A. 1986), *cert. denied*, 107 S.Ct. 1289 (1987) 13
United States v. Williams, 12 M.J. 1038 (A.C.M.R.), *pet. denied*, 14 M.J. 102 (C.M.A. 1982) 12
Wade v. Hunter, 336 U.S. 684 (1949) 13
Washington v. Texas, 388 U.S. 14 (1967) 12
Wasman v. United States, 468 U.S. 559 (1984) ... 8, 10
Wayte v. United States, 470 U.S. 598 (1985) 6, 7, 10, 14

Constitution and Statutes:

U.S. Constitution Amend. V 2, 7, 11
U.S. Constitution Amend. VI 2, 12, 13, 14, 15
10 U.S.C. § 802 4
10 U.S.C. § 834(a)(2) (Supp. II 1984) 13
10 U.S.C. § 846 ..... 2, 13
10 U.S.C. § 880 4
10 U.S.C. § 881 4
10 U.S.C. § 908 4
10 U.S.C. § 921 4
28 U.S.C. § 1259(3) (Supp. II 1984) 1

Other Authorities:

Fidell, *Judicial Tenure Under the Uniform Code of Military Justice System*, 30 N.Y.L. Sch. L. Rev. 757 (1985) 14
H.R. REP. No. 549, 98th Cong., 1st Sess. (1983) . 13
S. REP. No. 53, 98th Cong., 1st Sess. (1983) 13

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. _____

CHAD S. HAGEN,
MASTER SERGEANT, UNITED STATES ARMY,
PETITIONER,

v.

THE UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Chad S. Hagen, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in these proceedings.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at 25 M.J. 78 (C.M.A. 1987) (Appendix A). The opinion of the Army Court of Military Review is unreported, CM 445028 (A.C.M.R. June 25, 1985) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 25, 1987, affirming petitioner's conviction of August 3, 1983. The jurisdiction of the Court is invoked under 28 U.S.C. § 1259(3) (Supp. II 1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides:

Amendment V: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . ."

The Uniform Code of Military Justice (UCMJ) provides:

Article 46, 10 U.S.C. § 846 (1982)–"The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions."

STATEMENT OF THE CASE

From March to June 1982, petitioner sold a total of 38 hand grenades to an agent of the Bureau of Alcohol, Tobacco and Firearms (ATF), United States Department of Treasury (T. 188-96). Petitioner was arrested on July 14, 1982, while attempting to sell an additional 34 grenades (T. 197-98). Petitioner had conspired with First Lieutenant (1LT) Scott L. Johnston, who had participated in transforming inert grenades into incendiary grenades and who received proceeds from the sale of the grenades (Prosecution Exhibit 18). Lieutenant Johnston had also transformed a lawful semi-automatic machine gun into an unlawful automatic weapon (T. 152). Petitioner received the lawful weapon from Captain (CPT) David E. Rittenhouse and sold the weapon to the ATF agent after 1LT Johnston rendered it unlawful.

Charges were brought against petitioner and 1LT Johnston, but not against CPT Rittenhouse. Major General (MG) Wetzel, the commander of all three soldiers, ordered a trial to resolve the allegations against petitioner. He recommended approval of 1LT Johnston's resignation in lieu of trial. Accordingly, 1LT Johnston resigned and was not tried by court-martial. Captain Rittenhouse, who had previously served as an aide-de-camp to MG Wetzel, resigned his commission (T. 144).

At the time of trial, petitioner was prepared to retire after a 20-year military career (T. 469). He had been wounded three times while flying over 400 helicopter gunner missions in Vietnam (T. 471-72). His combat wounds included gunshot wounds to the head (T. 481). Symptoms of combat-induced post-traumatic stress disorder appeared within a year of petitioner's Vietnam tour of duty. Petitioner suffered from severe headaches, lapses of memory, nightmares, and a desire to return to Vietnam to be killed (T. 474-77). He became an alcoholic (*id.*).

At the time MG Wetzel ordered petitioner's trial on August 18, 1982, he received legal advice that petitioner was mentally responsible. Subsequently, a military psychiatrist indicated that at the time of the alleged offenses, as a result of post-traumatic stress disorder, petitioner *might* have lacked the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law, although he was competent to stand trial (Appellate Exhibt II). Petitioner sought further psychiatric evaluation because of the equivocal nature of the military psychiatrist's opinion. Doctor (Dr.) Dave M. Davis, a board-certified forensic psychiatrist and expert regarding post-traumatic stress disorder, examined petitioner. He rendered an opinion on March 31, 1983, that at the time of the alleged offenses, as a result of mental disease, petitioner lacked the substantial capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law (Appellate Exhibit VIII).

Thereafter MG Wetzel received legal advice to withdraw from trial and dismiss the charges against petitioner (Appendix C). The advice was based upon "the lack of evidence suffi-

cient to prove [petitioner] sane beyond a reasonable doubt and the expense the Government would incur by proceeding to trial . . ." (*id.*). The expense was $3,000.00 for the employment of Dr. Davis and the expense attendant to the production at trial of several material, out-of-state defense witnesses (*id.*). On April 21, 1983, MG Wetzel decided not to dismiss charges against petitioner. Within the same week, on April 27, 1983, MG Wetzel denied petitioner's request for Dr. Davis' witness fees (Appellate Exhibit VI).

Thereafter, MG Wetzel publicly stated, "Master Sergeant Hagen will be prosecuted. The Army has spent over $10,000.00 in preparing this case, and Master Sergeant Hagen will be prosecuted" (Appellate Exhibt XXIX) (Appendix D).

On these facts, petitioner moved the trial court to dismiss the charges on the grounds of prosecutorial misconduct and prosecutorial vindictiveness (Appellate Exhibit XXIX; T. 137-38) (Appendix D). Petitioner indicated to the trial court that MG Wetzel refused to be interviewed regarding his prosecutorial decisions. The court refused to order an interview or deposition of MG Wetzel (T. 153). The court also denied petitioner's motions to produce both MG Wetzel and CPT Rittenhouse as witnesses on the motion (T. 151, 153). The motion to dismiss was denied (T. 154).

Thereafter, petitioner was tried on August 1-3, 1983, at Fort Benning, Georgia. The court-martial invoked jurisdiction pursuant to Article 2, UCMJ, 10 U.S.C. § 802 (1982). Petitioner rested on the merits of the government's case without presenting a psychiatric defense (T. 342). He was found guilty of an attempt to wrongfully sell military property, conspiracy with 1LT Johnston to sell military property, wrongful sales of military property, and larceny, in violation of Articles 80, 81, 108, and 121, UCMJ, 10 U.S.C. §§ 880, 881, 908, and 921, respectively. He was sentenced to a bad-conduct discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. Both the Army Court of Military Review and the Court of Military Appeals affirmed the findings and sentence.

However, petitioner was psychiatrically evaluated after trial because of his inability to recall a decision to forego a psychiatric defense (Appendix B). A post-trial sanity board of psychiatrists unanimously reported that petitioner did not appear, at the time of trial, to have understood the nature of the proceedings against him and was then unable to conduct or cooperate intelligently in his defense (*id.*). Nevertheless, the Army Court of Military Review held that petitioner had possessed the mental capacity to stand trial (*id.*).

Petitioner presented to both the Army Court of Military Review and the Court of Military Appeals the issue whether the trial court correctly refused to compel MG Wetzel's testimony. The Army Court of Military Review considered the issue without discussion (Appendix B). The Court of Military Appeals granted discretionary review. 23 M.J. 44. The Court of Military Appeals concluded "that this record fails to show that [MG Wetzel] was vindictive or selective in his decision to cause [petitioner] to be prosecuted." 25 M.J. at 85. The court held:

> [A]s a general rule, government officials cannot be "called to the stand by every criminal defendant for cross-examination as to their motives in seeking an indictment" or its equivalent. *United States v. Falk*, 479 F.2d 616, 620 (7th Cir. 1973) (en banc). If, on the other hand,
>
> > a defendant alleges intentional purposeful discrimination *and presents facts sufficient to raise a reasonable doubt about the prosecutor's purpose*, . . . a different question is raised."
>
> *Id.* at 620-21 (emphasis added).
>
> We are satisfied that this record reveals no basis for the remedy of hailing [MG Wetzel] into court and requiring him to justify his motives in referring charges to a court-martial (or, as here, in not withdrawing them). The crimes of which appellant was accused were serious, and the available evidence was substantial. The underlying facts appellant alleges to support his claim of vindictive prosecution were not disputed. It is the inferences to be

> drawn from the facts, however, that do not support the conclusion he seeks.

25 M.J. at 85-6. The court distinguished petitioner's case from *United States v. Krezdorn*, 718 F.2d 1360 (5th Cir. 1983) (en banc), *cert. denied*, 465 U.S. 1066 (1984), on the basis that petitioner failed to make out a *prima facie* case of prosecutorial vindictiveness and thus failed to shift the burden of proof to the government. 25 M.J. at 85 n.5.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER PRESENTS THE ISSUE UNRESOLVED IN *WAYTE V. UNITED STATES*, 470 U.S. 598 (1985).

The Court held in *Wayte v. United States*, 470 U.S. 598 (1985), that that petitioner's equal protection defense of selective prosecution failed. There, the petitioner had not shown that the government prosecuted him *because* of his activities protesting a Selective Service System policy. 470 U.S. at 610 (Court's emphasis).

In dissent, Justice Marshall, joined by Justice Brennan, maintained that the critical issue was instead "whether Wayte has earned that right to discover Government documents relevant to his claim of selective prosecution." 470 U.S. at 614-15. The majority of the Court explained why it did not decide the discovery issue:

> Even if there were substance to this discovery issue, it was neither raised in the petition for certiorari, briefed on the merits, nor raised at oral argument. Wayte has simply not asserted such a claim before this Court.

470 U.S. at 605 n.5.

Here, petitioner asserted this discovery claim at trial and before the courts below. Those courts decided against petitioner on the basis that he had made an insufficient showing to discover the testimony of MG Wetzel. Petitioner's case properly presents the discovery issue which *Wayte* did not decide.[1]

---

[1] The issue arose in *Wayte* when the government refused to comply with the District Court's order requesting production of documents and the

II.

THE COURT OF MILITARY APPEALS HAS ADOPTED VIEWS OF A MINORITY OF THE COURTS OF APPEALS BY REQUIRING A SUBSTANTIAL SHOWING TO RAISE ISSUES OF PROSECUTORIAL MISCONDUCT.

To raise an equal protection defense of selective prosecution, a defendant must make a *prima facie* showing that the prosecutorial decision, singling him out for prosecution, was motivated by a discriminatory purpose. *Wayte v. United States*, 470 U.S. at 608. The decision to prosecute may not be based upon considerations of race or religion, or as retaliation for the exercise of constitutional or statutory rights. *Id.* The burden shifts to the state to advance a neutral explanation for its prosecutorial decision once the defendant makes a *prima facie* showing.[2] *Cf. Batson v. Kentucky*, 106 S.Ct. 1712, 1719-21 (1986). The defendant may establish a *prima facie* case of purposeful discrimination through inference arising from objective factors. *Id.*

In addition, the Due Process Clause also prohibits a vindictive prosecution designed to punish a person "because he has done what the law plainly allows him to do." *United States v. Goodwin*, 457 U.S. 368, 372 (1982), *quoting, Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). A "realistic likelihood of vindictiveness" suffices. *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984); *Blackledge v. Perry*, 417 U.S. 21, 27 (1974). For example, a presumption of vindictiveness arises when the same trial judge imposes a more severe sentence at a new trial following a successful appeal. The presumption may be rebutted only by the judge's articulation of objective reasons for imposition of the more severe sentence. *North Carolina v. Pearce*, 395 U.S 711, 726 (1969). A presumption of vindictiveness also attaches when a felony prosecution follows a defendant's invocation of a statutory right to appeal a mis-

---

testimony of Edwin Meese, III, Counselor to the President, relevant to the petitioner's claim of selective prosecution. 470 U.S. at 615-21.

[2] The state's failure to offer an explanation may establish the claim of selective prosecution. *E.g.*, United States v. Steele, 401 F.2d 1148 (9th Cir. 1972).

demeanor conviction. *Blackledge v. Perry*, 417 U.S. 21. Though the presumption is rebuttable, it alone establishes constitutional error when the state does not rebut it. *Thigpen v. Roberts*, 468 U.S. at 32 n.6.[3]

A presumption of vindictiveness does not as readily attach to pretrial prosecutorial decisions, such as the bringing of more serious charges after a defendant has exercised a constitutional or statutory right. *United States v. Goodwin*, 457 U.S. at 381-84. Nevertheless, a defendant need not rely on a presumption of vindictiveness to show a "realistic likelihood of vindictiveness." He may, instead, demonstrate actual vindictiveness by "prov[ing] objectively that the prosecutor's charging decision was motivated by a desire to punish him for something that the law plainly allowed him to do." *United States v. Goodwin*, 457 U.S. at 384. *See also Wasman v. United States*, 468 U.S. 559, 569 (1984) (plurality opinion) (defendant must affirmatively prove actual vindictiveness when a presumption of vindictiveness does not apply).

The Courts of Appeals have generally agreed regarding a defendant's burden to raise these constitutional issues of selective and vindictive prosecution.[4] Beginning with *United*

---

[3] In the cases where the burden shifts to the state upon the defendant's *prima facie* showing, the prosecutor is not "called to the stand." Instead, he must explain the reasons for the prosecution. *E.g.*, United States v. Goodwin, 457 U.S. at 371 n.2; Blackledge v. Perry, 417 U.S. at 29 n.7; United States v. Krezdorn, 718 F.2d at 1365; United States v. Andrews, 633 F.2d 449, 456 (6th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 927 (1981). The state's failure to explain establishes the claim of vindictiveness. North Carolina v. Pearce, 395 U.S. at 726.

Here, petitioner sought to interview MG Wetzel, and upon MG Wetzel's refusal to be interviewed, sought the trial court's order of an interview or deposition. It was only after MG Wetzel refused an interview that petitioner sought the trial court's order to compel MG Wetzel to testify. The Court of Military Appeals correctly presumes that petitioner would have been satisfied if the trial court had abated the proceedings until MG Wetzel agreed to testify. 25 M.J. at 80 n.2. Military law provides such a remedy. United States v. Caprenter, 1 M.J. 384 (C.M.A. 1976). In fact, the trial court invoked this remedy when the government objected to the production of Dr. Davis as a witness (T. 67).

[4] The Court of Military Appeals notes that petitioner did not articulate a selective prosecution argument at trial. 25 M.J. at 83. Nevertheless, peti-

States v. Berrigan, 482 F.2d 171, 181 (3d Cir. 1973), these courts have generally adopted a test requiring a "colorable entitlement" to a selective prosecution defense as the threshold for discovery. *United States v. Berrios*, 501 F.2d 1207, 1211-12 & n.4 (2d Cir. 1974); *United States v. Cammisano*, 546 F.2d 238, 241 (8th Cir. 1976); *United States v. Murdock*, 548 F.2d 599, 600 (5th Cir. 1977); *United States v. Gordon*, 817 F.2d 1538, 1540 (11th Cir. 1987). Entitlement to discovery is dependent on the introduction of "*some evidence* tending to show the existence of the essential elements of the defense." *United States v. Schmucker*, 815 F.2d 413, 418 (6th Cir. 1987), *quoting, United States v. Berrios*, 501 F.2d at 1211 (emphasis added). A defendant is entitled to an evidentiary hearing if his selective prosecution showing "takes the question beyond the frivolous stage." *United States v. Hazel*, 696 F.2d 473, 475 (6th Cir. 1983); *United States v. Erne*, 576 F.2d 212, 216 (9th Cir. 1978).

The Court of Military Appeals chose not to apply this majority test. Instead, the court chose to adopt a minority standard of *United States v. Falk*, 479 F.2d 616, 620 (7th Cir. 1973) (en banc),[5] requiring a presentation of facts "sufficient to raise a reasonable doubt about the prosecutor's purpose." 25 M.J. at 85.[6]

---

tioner did move for dismissal of the charges because of prosecutorial misconduct and prosecutorial vindictiveness on several bases, including the nonprosecution of 1LT Johnston (Appellate Exhibit XXIX) (Appendix D). He also requested and was denied CPT Rittenhouse as a witness on the motion (T. 137-38, 153). Thus, petitioner's claim embodied selective prosecution concepts.

[5] The Seventh Circuit Court of Appeals continues to apply this standard. United States v. Kerley, 787 F. 2d 1147, 1148 (7th Cir. 1986). *See also*, United States v. Jennings, 724 F.2d 436, 445 (5th Cir.), *cert. denied*, 467 U.S. 1227 (1984); United States v. Saade, 652 F.2d 1126, 1135 (1st Cir. 1981). One Circuit court has adopted both standards. United States v. Larson, 612 F.2d 1301, 1304-05 (8th Cir.), *cert. denied*, 446 U.S. 936 (1980).

[6] The selective prosecution showing petitioner presented to the trial court was "some evidence" which took the question beyond the frivolous stage, "colorably entitling" petitioner to discovery and a hearing with MG

With regard to a *prima facie* showing of vindictive prosecution, the Court of Military Appeals is alone in requiring a showing of discriminatory intent. 25 M.J. at 84, *citing, United States v. Andrews*, 633 F.2d 449 (6th Cir. 1980) (en banc). The Courts of Appeals, following this Court, have required neither discriminatory intent nor actual vindictiveness, but only a "realistic likelihood of vindictiveness." *Thigpen v. Roberts*, 468 U.S. at 30; *Blackledge v. Perry*, 417 U.S. at 27-29 (potential for vindictiveness; actual retaliatory motivation need not inevitably exist);[7] *United States v. Crocker*, 788 F.2d 802, 809 (1st Cir. 1986) (reasonable likelihood of vindictiveness); *Lane v. Lord*, 815 F.2d 876, 879

Wetzel's and CPT Rittenhouse's testimony – even if the showing did not raise a reasonable doubt about MG Wetzel's purpose.

Petitioner relies upon three sets of circumstances to establish a non-frivolous showing of selective prosecution:

(1) MG Wetzel's allowing resignation of his former aide-de-camp after he was implicated in the investigation;

(2) MG Wetzel's decision to prosecute petitioner but not 1LT Johnston at a time when all indications were that petitioner was then competent to testify against 1LT Johnston but had not been mentally responsible at the time of his own alleged offenses (T. 142-49) (Appendix E), and;

(3) MG Wetzel's refusal to follow legal advice to dismiss charges against petitioner on the basis there was insufficent evidence to prove petitioner's *mens rea* and on the basis of the cost of prosecution; his refusal within the same week to authorize funds to employ Dr. Davis as a witness; and, his public remarks that $10,000.00 had been spent on petitioner's prosecution and petitioner would be prosecuted.

The Court of Military Appeals views the public remarks as neutral on their face, and even suggests that they indicate MG Wetzel made a decision to prosecute petitioner despite the cost of the prosecution. 25 M.J. at 84. Petitioner's view is that, if MG Wetzel chose to prosecute him *despite* the cost of prosecution, he should have approved and not disapproved the funds for Dr. Davis. The sequence of events tends to establish petitioner's required showing that MG Wetzel prosecuted petitioner *because* of the cost of petitioner's defense. *See* Wayte v. United States, 470 U.S. at 610. General Wetzel decided not to dismiss the charges, refused to authorize funds for petitioner's presentation of a defense, and then publicly explained the cost and therefore the decision to prosecute.

[7] A plurality of the Court adopted the view in Wasman v. United States, 468 U.S. at 568, that actual vindictiveness is required.

(2d Cir. 1987); *United States v. Oliver*, 787 F.2d 124, 125 (3d Cir. 1986) (actual retaliatory motivation need not exist); *United States v. Goodwin*, 637 F.2d 250, 252-53 (4th Cir. 1981), *rev'd on other grounds*, 457 U.S. 368 (1982) (no actual vindictiveness but a "genuine risk of retaliation"); *United States v. Guthrie*, 789 F.2d 356, 361 (5th Cir. 1986); *United States v. Andrews*, 633 F.2d at 454 ("whether a reasonable person would think there existed a realistic likelihood of vindictiveness"); *United States v. Partyka*, 561 F.2d 118 (8th Cir. 1977), *cert. denied*, 434 U.S. 1037 (1978); *United States v. Meyer*, 810 F.2d 1242 (D.C. Cir.), *vacated and rehearing en banc ordered*, 816 F.2d 695 (1987). *But Cf. United States v. Gallegos-Curiel*, 681 F.2d 1164, 1167 (9th Cir. 1982) (real likelihood of actual vindictiveness); *Miracle v. Estelle*, 592 F.2d 1269, 1275 n.11 (5th Cir. 1979).[8] To the extent it requires a showing of discriminatory intent and actual vindictiveness to entitle petitioner to discovery and a hearing on the issue of vindictive prosecution, the holding of the Court of Military Appeals is not in accord with the majority of the Courts of Appeals.

Therefore, regarding the basic threshold showing necessary to raise claims of selective and vindictive prosecution, and the degree, if any, to which either discriminatory intent or actual vindictiveness must be shown to raise a claim of vindictive prosecution, the Court of Military Appeals has not followed the holdings of the majority of the Courts of Appeals in this case. The court advanced no justification for its holding based upon military necessity.[9] Consequently, the

---

[8] If not required to show either discriminatory intent or actual vindictiveness, petitioner presented a sufficient showing of "a realistic likelihood of vindictiveness" to earn an entitlement to discovery and to shift the burden to the government to explain its prosecutorial decision. *See* note 6, *supra*. If petitioner is required to present "some evidence" of actual vindictiveness, MG Wetzel's actions and public remarks constitute such evidence. *Id.*

[9] Inasmuch as the Due Process Clause protects military accused, Burns v. Wilson, 346 U.S. 137, 142-43 (1953), the Court of Military Appeals has established a rule that the application of a different due process rule in the military than obtains in the civilian sector requires a showing of a military need for the different rule. United States v. Ezell, 6 M.J. 307, 313 (C.M.A. 1979).

court has unjustifiably and severely limited the circumstances in which military commanders must explain issues of selective or vindictive prosecution.[10]

III.

PETITIONER'S CASE IS A REASONABLE VEHICLE FOR INTERPRETATION OF THE COMPULSORY PROCESS CLAUSE.

The Court has never squarely held that the Compulsory Process Clause requires the government to produce exculpatory evidence. *Pennsylvania v. Ritchie*, 107 S.Ct. 989, 1001 (1987). The question of discovery is, instead, traditionally evaluated by Due Process Clause standards. *Id.* Nevertheless, the Court has indicated that all persons are subject to the Compulsory Process Clause's demand for evidence. *United States v. Nixon*, 418 U.S. 683, 713 (1974) (presidential privilege must yield to the demonstrated, specific need for evidence in a criminal trial). The Clause prohibits the state from arbitrarily denying a criminal defendant the right to put on the stand a witness whose testimony is relevant and material to the defense. *Washington v. Texas*, 388 U.S. 14, 23 (1967). Without deciding whether to rely primarily on the Compulsory Process Clause, the Confrontation Clause, or the Due Process Clause, the Court has held that the Constitution guarantees a criminal defendant a meaningful opportunity to present a complete defense. *Crane v. Kentucky*, 106 S.Ct. 2142, 2146 (1986).

The military context of petitioner's compulsory process claim supports, rather than denigrates, the invocation of the Compulsory Process Clause as the basis for analysis. First, the improper prosecutorial decisions of commanding gen-

---

[10] Such claims are as likely to arise in the military context as elsewhere. *See* United States v. Garwood, 20 M.J. 148 (C.M.A.), *cert. denied*, 474 U.S. 1005 (1985); United States v. Moultak, 21 M.J. 822 (N.M.C.M.R. 1985); United States v. Blanchette, 17 M.J. 512 (A.F.C.M.R. 1983), *pet. denied*, 18 M.J. 22 (C.M.A. 1984); United States v. Tatum, 17 M.J. 757 (C.G.C.M.R.), *pet. denied*, 19 M.J. 7 (C.M.A. 1984); United States v. Williams, 12 M.J. 1038 (A.C.M.R.), *pet. denied*, 14 M.J. 102 (C.M.A. 1982); United States v. Bass, 11 M.J. 545 (A.C.M.R.), *pet. denied*, 11 M.J. 417 (C.M.A. 1981).

erals are subject to judicial review. *Wade v. Hunter*, 336 U.S. 684, 692 (1949). Moreover, with the expansion of court-martial jurisdiction, commanding generals now make more prosecutorial decisions, many of which involve traditionally civilian cases. *See Solorio v. United States*, 107 S.Ct. 2924 (1987). Significantly, the congressional decision to grant commanding generals broad prosecutorial authority creates potential for abuse that concerns even Congress. S. Rep. No. 53, 98th Cong., 1st Sess. 2 (1983).[11] *See United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986), *cert. denied*, 107 S.Ct. 1289 (1987). Military accused have long enjoyed Compulsory Process Clause protection. *United States v. Hinton*, 21 M.J. 267, 269 (C.M.A. 1986). Congress has required that compulsory process of military courts "shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue. . . ." Article 46, UCMJ, 10 U.S.C. § 846.[12] Last, military trial judges, who are uniformed military officers, are less likely to compel the testimony of commanding generals given their own military status and lack of judicial

---

[11] In fact, Congress has taken some prosecutorial discretion away from commanding generals and placed it in their legal advisors. 10 U.S.C. § 834 (Supp. II 1984) (amending 10 U.S.C. § 834 (1982)). This was done in order to unburden commanders from the need to make complex legal judgments and to fully protect the rights of the accused. H.R. Rep. No. 549, 98th Cong., 1st Sess. 14 (1983). *See* United States v. Hayes, 24 M.J. 786, 790 (A.C.M.R. 1987). Now, a commanding general cannot order trial by general court-martial unless his legal advisor indicates that charges are warranted by the evidence. 10 U.S.C. § 834(a)(2). Thus, the legal advice that MG Wetzel received on April 21, 1983, that there was a lack of evidence sufficient to prove petitioner's *mens rea* beyond a reasonable doubt (Appendix C) would, under the new standard, have rendered petitioner's prosecution problematic.

[12] The Court of Military Appeals failed to apply this statute in resolving petitioner's discovery claim. The statute entitles military defendants equal access to all relevant evidence, whether or not it is apparently exculpatory. United States v. Garries, 22 M.J. 288, 293 (C.M.A. 1986); United States v. Kern, 22 M.J. 49, 51 (C.M.A. 1986). Meeting a low threshold of relevance entitles a military defendant to discovery. United States v. Reece, 25 M.J. 93, 95 (C.M.A. 1987).

tenure. *See* Fidell, *Judicial Tenure Under the Uniform Code of Military Justice System*, 30 N.Y.L. Sch. L. Rev. 757 (1985).[13]

Accordingly, petitioner presents an issue, involving the compulsory pretrial discovery of a commanding general's testimony, which squarely invokes Compulsory Process Clause concerns.[14]

---

[13] A federal district court might have more readily compelled MG Wetzel's testimony. *See* Wayte v. United States, 470 U.S. at 615-18 (district court ordered the production of Edwin Meese III, Counselor to the President, as a witness). *See also* Calley v. Callaway, 519 F.2d 184, 214-17 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976) (district court held that the failure of the court-martial to compel witnesses violated the Compulsory Process Clause, even though Lieutenant Calley presented no evidence to support his claim of unlawful commanders' influence of the court-martial, about which the witnesses would have testified).

[14] A post-trial hearing could adequately determine the prejudicial effect of the trial court's failure to compel discovery. Rushen v. Spain, 464 U.S. 114, 119-20 (1983) (per curiam). Such a remedy would eliminate any occasion for petitioner to use his imagination regarding MG Wetzel's remarks, 25 M.J. at 84, and would provide a factual basis for resolution of petitioner's claim of selective and vindictive prosecution, rather than the Court of Military Appeals' resolution based upon speculation. 25 M.J. at 86.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Military Appeals. The proceedings in the courts below have framed issues of discovery, burden of proof regarding claims of vindictive and selective prosecution, and Compulsory Process Clause interpretation.

Respectfully submitted,

JOHN T. EDWARDS
Colonel, Judge Advocate General's Corps (JAGC)
United States Army
Defense Appellate Division
U.S. Army Legal Services Agency
5611 Columbia Pike
Falls Church, Virginia 22041
(202) 756-1807
Counsel of Record

and

RUSSELL S. ESTEY
Major, JAGC
United States Army

SCOTT A. HANCOCK
Captain, JAGC
United States Army

RICHARD J. ANDERSON
Captain, JAGC
United States Army

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 53,245.
CM 445028.

UNITED STATES, APPELLEE,

v.

CHAD S. HAGEN,
MASTER SERGEANT UNITED STATES ARMY,
APPELLANT.

Sept. 25, 1987.

For Appellant: *Captain Richard J. Anderson* (argued); *Lieutenant Colonel Paul J. Luedtke and Major Dale K. Marvin* (on brief); *Colonel Brooks B. La Grua* and *Major John E. King.*

For Appellee: *Captain George R. Gillette* (argued); *Colonel Norman G. Cooper* and *Lieutenant Colonel Gary F. Roberson* (on brief); *Colonel James Kucera, Lieutenant Colonel Adrian J. Gravelle, Major Byron J. Braun, Captain John F. Burnette.*

Opinion of the Court

COX, Judge:

A military judge, sitting as a general court-martial, convicted appellant, contrary to his pleas, of larceny, wrongful sale of military property, attempted wrongful sale of military property, and conspiracy to sell military property, in violation of Articles 121, 108, 80, and 81, Uniform Code of Military Justice, 10 U.S.C. §§ 921, 908, 880, and 881, respectively.[1] We granted review of the following issue:

---

[1] His sentence to a bad-conduct discharge, total forfeitures, confinement for 30 months, and reduction to Private (E-1) was approved by the con-

WHETHER THE MILITARY JUDGE ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY FAILING TO COMPEL THE CONVENING AUTHORITY TO TESTIFY CONCERNING HIS DECISION TO REFER TO TRIAL CHARGES AGAINST APPELLANT CONTRARY TO THE ADVICE OF HIS STAFF JUDGE ADVOCATE.

Appellant's theory of error is considerably more involved than the issue would admit. He argues essentially that the convening authority was vindictive and discriminatory in his decision to cause or persist in appellant's prosecution, such that appellant's rights under the Due Process Clause of the Fifth Amendment (which includes the concept of Equal Protection) of the United States Constitution were violated. In support of these claims, appellant cites the convening authority's actions in the following particulars: (1) his decision not to prosecute others associated with the underlying course of criminal conduct; (2) certain of his comments to a group of noncommissioned officers; (3) his resistance to securing a defense-requested expert witness; (4) his refusal to be interviewed by civilian defense counsel; and (5) his failure to follow the acting staff judge advocate's advice to withdraw the charges. The issue merely states the fallback position that, since it was appellant's burden to establish vindictiveness or selectivity, if the other indications of record were not sufficient in and of themselves to carry that burden, then at least they raised enough of an inference of impropriety to warrant a judicial examination of the convening authority to ascertain his motives.[2] Finding no error in either the convening authority's conduct or the military judge's decision, we affirm.

I

A full development of the facts and chronology of the case is necessary to put the granted issue in perspective. The

---

vening authority; and the findings and sentence were affirmed by the Court of Military Review in an unpublished memorandum opinion.

[2] Presumably appellant would have been equally satisfied if the military judge had simply abated the proceedings until the convening authority voluntarily agreed to testify.

Government's evidence was that, during the period March to July, 1982, at Fort Benning, Georgia, appellant stole quantities of "inert" hand grenades and other munitions from the Government. In addition, First Lieutenant Scott L. Johnston, in collaboration with appellant, converted these grenades into live explosives. Finally, in furtherance of the joint enterprise, appellant sold a number of these reconstituted grenades on four occasions and he attempted a fifth sale.[3]

---

[3] The defense also made allegations about Captain David E. Rittenhouse, who had been the convening authority's aide-de-camp during a previous assignment. The contention was that Rittenhouse was involved in some way with the case but that the general treated him with partiality due to their association and friendship. Captain Rittenhouse resigned his commission, apparently after his name popped up in the investigation; no action was taken against him. The only thing that links this resignation to the investigation is the sequence of events. Strictly speaking, nothing in the record of trial supports the suggestion that Rittenhouse was involved in any misconduct. Countering appellant's naked claim, trial counsel *proffered* that Rittenhouse had owned a semiautomatic weapon; that he sold it to Johnston; that Johnston converted it to a fully automatic weapon; and that the CID determined that Rittenhouse had committed no crime.

The only other information that can be gleaned comes from the allied papers. One of appellant's admissions (received as an exhibit at the investigation under Article 32, Uniform Code of Military Justice, 10 U.S.C. § 832, but not admitted at trial) essentially corroborates trial counsel's proffer. According to the statement:

> The second one [described as a fully-automatic Ingram] I sold originally came from CPT RITTENHOUSE. He was asking around where I work if somebody wanted to buy it. At the time he wanted to sell the weapon it was a legal weapon and was semiautomatic. He left it at the place of work and LT JOHNSTON took it [and] fixed it to fire fully automatic and gave it to me and I sold it to the undercover AT and F agent.

Rittenhouse's account (found in the allied papers) corroborates the transfer of what was described as an "RPB 9mm firearm" to appellant for the purpose of resale. Later, appellant gave Rittenhouse the proceeds of the sale ($400). Appellant did not provide Rittenhouse a receipt and would not reveal to whom he had sold it. Rittenhouse denied having any knowledge of the illegal conversion of the weapon.

Apart from civilian defense counsel's general assertion that there was something smelly in all of this, there is no other information about Rittenhouse and his activities before us.

The case against appellant was initiated by agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF), United States Department of Treasury. They gained appellant's acquaintance and confidence through an informant. All transactions of which appellant was convicted and the attempt were made directly to ATF agents. Appellant was led to believe that he was supplying munitions to the Mafia. The Criminal Investigation Command (CID) at Fort Benning was first notified of the operation after it was in progress. CID agents then got involved in taking statements and other nonoperational aspects of the investigation. Basically, the Government's evidence consisted of: a description of appellant's conduct and statements as observed by one of the ATF agents who participated in the transactions; audio and videotapes of portions of the transactions; the contraband as received or seized from appellant; and appellant's sworn, written confession.

Like appellant, Johnston was a range control officer and had access to and control over various types of ammunition and weapons. Apart from appellant's assertions and confessions, relatively little is shown in this record about Johnston's activities. Unlike appellant, Johnston was not personally involved in the transfer of contraband to ATF agents. Further, upon being questioned by the CID, Johnston exercised his rights and declined to make a statement. If he made a statement at another time, this record does not so indicate.

During his unwitting contacts with federal agents, appellant kept mentioning that he had a partner; but, up until the time of his arrest, he never revealed Johnston's name. The agents worked hard to get an introduction to this partner. On at least one occasion, they flew appellant to a location where they wined and dined him, and they introduced him to some supposedly "heavy people" (ATF agents posing as mafiosi) in an unsuccessful attempt to "loosen him up" and get the introduction to Johnston. Even after appellant was apprehended, had agreed to work for the agents, and was wired for sound, they were unable to get any incriminating statements from Johnston. To be sure, there is some indica-

tion in this record of other, independent evidence against Johnston, but it is largely peripheral, at least as to the more serious charges. There can be no doubt, based on this record or any other facts or evidence suggested by the defense, that appellant's testimony against Johnston would have been the heart of any military prosecution of Johnston.

The convening authority referred appellant's charges to the court-martial on August 18, 1982. Thereafter, pursuant to defense request and with the concurrence of the Government, the military judge ordered that a medical board be convened to assess appellant's sanity. On November 4, 1982, Gerson Z. Escondo, M.D., the psychiatrist who constituted the board, reported that

> at the time of [the] alleged offense, as a result of post-traumatic stress disorder, [appellant] *might lack the capacity to appreciate the criminality of his conduct . . . [and] might lack the capacity to conform his conduct to the requirement of the law.*

(Emphasis added.) Dr. Escondo concluded, however, that appellant was competent to stand trial.

In the meantime, Johnston had been charged with conspiracy, larceny, conduct unbecoming an officer and a gentleman, unlawfully possessing hand grenades, and unlawfully making destructive devices, in violation of Articles 81, 121, 133, and 134, UCMJ, 10 U.S.C. §§ 881, 921, 933, and 934, respectively. On October 22, 1982, Johnston submitted a "Resignation for the Good of the Service," under the provisions of chapter 5, Army Regulation 635-120.

On November 24, 1982, the acting staff judge advocate formally advised the convening authority to recommend approval of Johnston's request (secretarial approval was required and subsequently obtained). The reasons cited by the acting staff judge advocate were:

> (1) That appellant's credibility would be severely affected by the sanity board's finding that he might have lacked capacity to appreciate the wrongfulness of his conduct; and

(2) That the delay occasioned by defense-requested psychiatric evaluations in appellant's case was prejudicing Johnston's speedy-trial rights.

The acting staff judge advocate also noted that Johnston's commanders had recommended approval of his resignation and of a discharge under conditions other than honorable. Consistent with the advice of his subordinates, the convening authority recommended approval of the resignation.[4]

In view of the inconclusive nature of Dr. Escondo's findings, appellant had indeed sought clarification of his mental status. The defense requested an examination by a specialist in the field of what it termed "Viet Nam Delayed Stress Syndrome," allegedly a type of post-traumatic stress disorder. The Government initially sought to facilitate the defense request. Prior to the first session of the court-martial, which occurred on November 29, 1982, the Government offered the services of Dr. Armitage, supposedly the only Army forensic psychiatrist in the continental United States. However, Dr. Armitage became unavailable due to a death in the family, and, upon further inquiry, the Government learned that there was no recognized psychiatric specialty in the area of post-traumatic stress disorder. Therefore, the Government offered the services of any other psychiatrist, especially

---

[4] A newspaper account from *The Columbus Ledger*, May 6, 1983, which is included among the allied papers, reports:

> Arrested in connection with Hagen was Fort Benning 1st Lt. Scott L. Johnston, charged with possession, transfer and manufacturing of unregistered machine guns, an AFT agent said.
>
> But Wetzel dropped military charges against Johnston because there wasn't enough evidence to get a conviction, said Frank Martin, Johnston's Columbus attorney.
>
> Johnston left the Army on a less-than-honorable discharge, Martin said.
>
> Johnston pleaded guilty to two counts of possession of unregistered firearms in the Montogmery, Ala., federal court Feb. 1. He was sentenced to five years probation.

There is no other mention of a federal prosecution of Johnston in the record.

Dr. Randall J. Brewer, Chief of Psychiatry at Fort Gordon, who happened to be readily available. The defense declined the offer.

Before the second session of the court-martial, the defense identified a civilian expert, Dr. Dave M. Davis of Atlanta, Georgia, who met their criteria, and they requested that Major General Wetzel, the convening authority, make him available. Counsel estimated the cost at $4000. General Wetzel declined. At that second hearing, on December 15, 1982, the defense renewed its request before the military judge. The judge also refused to order the employment of Dr. Davis and held that the convening authority had not abused his discretion in failing to accede to the request.

The next session of the court-martial was not held until March 28, 1983. The defense did not there renew its motion for the procurement of Dr. Davis but indicated that appellant had raised a little over $1000 and had himself examined by Dr. Davis. Defense counsel reported that, though his written report was not yet available, Dr. Davis had informed him "that he concurs in what Dr. Escondo's findings were and goes a little beyond that." The defense also notified the military judge that appellant was continuing to receive psychiatric treatment from Dr. Escondo.

As previously indicated, appellant's charges were *referred* to court-martial on August 18, 1982, *with* the staff judge advocate's recommendation. Some 8 months later, on April 21, 1983 (after Johnston's resignation had been approved), the acting staff judge advocate recommended *withdrawal* of the charges against appellant. The recommendation was prompted by a prosecutorial evaluation of the strength of the evidence (*i.e.*, of appellant's sanity) and the projected costs. General Wetzel disregarded the recommendation, and the prosecution continued.

By the next session of the court-martial, on May 11, 1983, the defense had again asked General Wetzel to provide Dr. Davis as a witness, and again he had refused. Defense counsel had also unsuccessfully sought to interview General Wetzel and now wished to call him as a witness in the court-martial to "determine whether or not he has, in fact, abused

his discretion" in failing to provide the funds to obtain Dr. Davis' testimony. The issue at this point of the proceedings was not yet convening authority misconduct, but the materiality of the witness, Dr. Davis.

But now the Government "concede[d]" that Dr. Davis had become "an essential witness." The Government's new position was that, when Dr. Davis was just another psychiatrist, he was not a material witness. However, appellant's action in having himself examined, such that Dr. Davis formed an opinion as to his sanity, made Dr. Davis' testimony material. In this circumstance, the Government did not object to producing Dr. Davis. The Government did, however, disagree with having to produce him at the rate contracted for by appellant. The fee request was by then down to $3,000 (apparently the balance after what appellant had already invested). The session of the court-martial ended with the judge ordering the Government to produce Dr. Davis on penalty of abatement. The fee arrangement was not resolved.

Before the next session of the court-martial, the prosecution and the defense entered into what they termed a "stipulation" that the court-martial might appoint Dr. Armitage (who, in the intervening 7 months, again had become available) as an expert witness. By the time of the hearing, however, on June 20, 1983, the defense withdrew from this agreement. The situation was that Dr. Escondo's expected testimony had evolved to the point of virtual identity with Dr. Davis' opinion, and the defense opposed any further mental evaluation of appellant. It was the Government, at that point, that wanted further examination. The judge denied the Government's effort. Also at the session, the Government announced its willingness to pay Dr. Davis at the rate of $350 per day – purportedly the standard federal fee for expert witnesses.

At a session of the court-martial held on July 26, 1983, the defense, for the first time, moved to dismiss the charges and specifications "based on . . . prosecutorial vindictiveness." The history of General Wetzel's resistance to providing funds for Dr. Davis was reiterated, as were the general's refusal to

dismiss the charges as recommended by the acting staff judge advocate and his alleged preferential treatment of Captain Rittenhouse *(see* n. 3, *supra)* and Lieutenant Johnston. Further, the defense proffered that it could produce witnesses who would testify that General Wetzel had stated, at a breakfast for senior NCOs, that

> Master Sergeant Hagen will be prosecuted. The Army has spent over $10,000.00 in preparing this case, and Master Sergeant Hagen will be prosecuted.

For purposes of the motion, the military judge accepted the truth of the defense's factual allegations. Nonetheless, he denied the motion, apparently on the ground that the evidence failed to raise an issue of misconduct or vindictiveness.

After the prosecution presented its case, as previously summarized, on July 26 and August 1, 1983, the defense rested without presenting any evidence on the merits.

II

Appellant's selective-prosecution argument (equal protection) apparently was not articulated at trial. As we noted in *United States v. Garwood*, 20 M.J. 148, 154 (C.M.A.), *cert. denied*, 474 U.S. 1005, 106 S.Ct. 524, 88 L.Ed.2d 456 (1985), *quoting United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir.1974):

> To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

An accused must show more than a mere possibility of selective prosecution; he must show discriminatory intent. *Wayte*

v. United States, 470 U.S. 598, 607-10, 105 S.Ct. 1524, 1531-32, 84 L.Ed.2d 547 (1985); *cf. Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

Appellant's theory on appeal is that he alone was singled out for prosecution in retaliation for his legitimate attempts to exercise his constitutional right to a trial. The record does not support him. Appellant cannot criticize the convening authority for failing to prosecute Captain Rittenhouse when appellant himself provided the refutation of Rittenhouse's criminality. The Rittenhouse matter is, in truth, nothing but a smoke screen. *See* n. 3, *supra*.

With regard to Johnston, we conclude that General Wetzel had a legitimate basis for treating him differently. The reasons cited by the acting staff judge advocate for recommending acceptance of the resignation speak for themselves and are entirely justifiable. In retrospect, it may be noted that appellant's trial on the merits did not actually commence until 8 months after the general's action on the Johnston petition. Moreover, it cannot be determined from this record whether General Wetzel was aware that Johnston might yet be subject to federal civilian prosecution at the time he made his recommendation. *See* n. 4, *supra*. Thus, we conclude that appellant was not selectively prosecuted.

III

Appellant next contends that the decision to prosecute him was in *retaliation* for his exercise of certain constitutional rights. Ordinarily, the forum for vindicating oneself in a criminal justice system is the trial. The law regarding claims of prosecutorial vindictiveness is well-settled. Public officials making decisions to prosecute exercise broad discretion. *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978). Courts are hesitant to review decisions whether to prosecute. *Wayte v. United States*, *supra* 470 U.S. at 607-08, 105 S.Ct. at 1531. There is a strong presumption that the convening authority performs his duties as a public official without bias. *Cf. Schweiker v.*

McClure, 456 U.S. 188, 195, 102 S.Ct. 1665, 1669, 72 L.Ed.2d 1 (1982); *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975). A party complaining of a public official's bias bears the burden of rebutting that presumption. *Schweiker v. McClure, supra*, 456 U.S. at 196, 102 S.Ct. at 1670. As with a charge of selective prosecution, an accused must show more than a mere possibility of vindictiveness; he must show discriminatory intent. *United States v. Andrews*, 633 F.2d 449 (6th Cir.1980) (en banc). Once a *prima facie* case of vindictiveness is made out, however, the burden shifts to the prosecution to disprove the misconduct. *United States v. Krezdorn*, 718 F.2d 1360, 1365 (5th Cir.1983) (en banc), *cert. denied*, 465 U.S. 1066, 104 S.Ct. 1416, 79 L.Ed.2d 742 (1984).

In his attempt to show that the convening authority was vindictive, appellant cumulates his assertions. We have already rejected his claim that he was singled out for prosecution in bad faith. We also view the convening authority's various decisions with respect to Dr. Davis as entirely correct in law and fact. Appellant had no right to select the expert of his choice and bind the Government to pay for him. *Ake v. Oklahoma*, 470 U.S. 68, 83, 105 S.Ct. 1087, 1097, 84 L.Ed.2d 53 (1985); *United States v. Mustafa*, 22 M.J. 165, 169 (C.M.A.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 444, 93 L.Ed.2d 392 (1986). Both the convening authority and the military judge were within their discretion in concluding that adequate experts were made available to the defense. In any event, once Dr. Davis became a concededly material witness, all appropriate measures were undertaken to assure his presence. It was the defense itself that elected to forego the psychiatric defense; the convening authority's conduct was not objectionable.

Next, the general's alleged remarks to the NCOs concerning the costs of prosecution affords appellant a launching pad for his imagination. Assuming, *arguendo*, the comments were even uttered, they are neutral on their face. Surely a willingness to pursue justice, despite the cost, is not a ground for reversal. It would be a strange world indeed it only inexpensive prosecutions could be maintained.

Appellant, however, extrapolates from this alleged statement the vindictive motive to punish him for attempting to force the Government to spend money on his psychiatric defense. A word about appellant's bizarre theory of vindictiveness is in order. First, the issue he assigns, which identifies the convening authority's "decision to refer to trial charges against appellant contrary to the advice of his staff judge advocate," is inaccurate. As previously noted, the convening authority's decision to refer appellant's charges to a court-martial was made on August 18, 1982, *pursuant to the advice of his staff judge advocate.* Appellant did not begin requesting psychiatric evaluations until *after* the referral to court-martial. It was not until April 21, 1983, that the *acting* staff judge advocate recommended *withdrawal* of the charges, based in part on potential expense. It was this advice that the convening authority rejected.

Thus, as reformulated, appellant's claim of *retaliation* for exercising his rights, *i.e.*, running up the bill, must be this:

(1) General Wetzel would have, in the ordinary course of events, dismissed the charges against appellant, and

(2) The reason he did not withdraw the charges was that he was punishing appellant for requesting evaluation by Dr. Davis.

This is patently absurd. Appellant was a senior noncommissioned officer in the convening authority's command who had been caught red-handed by federal agents in diverting government property and selling explosives to what he thought was an ongoing criminal enterprise. It is ridiculous to assume that General Wetzel would inexorably have dismissed these serious charges if only appellant had not sought psychiatric evaluation. Retaliation through nonwithdrawal, at least under these circumstances, simply beggars logic.

The argument that the general's rejection of the acting staff judge advocate's recommendation demonstrates impure motive is also fallacious. By all accounts, appellant was a crack NCO. He was in charge of approximately 100 other NCOs, not to mention being a highly decorated combat veteran. Even appellant's own witnesses, called during the

sentencing phase to show that he had his quirks, cited his extreme competence and professionalism. Apparently, the general had a better appreciation than did the acting staff judge advocate of just how impressive lay testimony about an accused's behavior can be. When there is substantial evidence that an accused is sane, notwithstanding that there may also be evidence to the contrary, there is nothing wrong with submitting the matter to an impartial factfinder.

We conclude that this record fails to show that the convening authority was vindictive or selective in his decision to cause appellant to be prosecuted.

IV

It remains to be resolved whether the evidence was sufficient nevertheless to require that the convening authority be called to the stand to justify his decisions. As previously indicated, appellant's counsel had unsuccessfully sought a pretrial interview of the convening authority for this same purpose. Counsel's explanations to the military judge make it quite clear that counsel was on a fishing expedition, hoping to get the convening authority to make some statement that could be used against him to bolster their argument of vindictiveness/selectivity.

Evidently, few cases discuss when, if ever, a *prosecutor* can be called to the stand by a defendant and made to justify his official actions. The presumption of propriety would indeed be trivial if this could be done in any but the most extraordinary situations. Therefore, we hold that, as a general rule, government officials cannot be "called to the stand by every criminal defendant for cross-examination as to their motives in seeking an indictment" or its equivalent. *United States v. Falk*, 479 F.2d 616, 620 (7th Cir.1973) (en banc). If, on the other hand,

> a defendant alleges intentional purposeful discrimination *and presents facts sufficient to raise a reasonable doubt about the prosecutor's purpose*, . . . a different question is raised.

Id. at 620-21 (emphasis added).[5]

---

[5] *Cf. United States v. Krezdorn*, 718 F.2d 1360 (5th Cir.1983) (en banc), *cert. denied*, 465 U.S. 1066, 104 S.Ct. 1416, 79 L.Ed.2d 742 (1984), where

We are satisfied that this record reveals no basis for the remedy of hailing the convening authority into court and requiring him to justify his motives in referring charges to a court-martial (or, as here, in not withdrawing them). The crimes of which appellant was accused were serious, and the available evidence was substantial. The underlying facts appellant alleges to support his claim of vindictive prosecution were not disputed. It is the inferences to be drawn from the facts, however, that do not support the conclusion he seeks.

We would not be surprised, indeed, to learn that the convening authority was upset at discovering this breach of duty and trust by one of his senior NCOs. But a convening authority's mere shock or outrage at criminal conduct within his

---

the prosecutor's action in securing an indictment on an additional charge, after the original charges were reversed on appeal, made out "[a] prima facie case of prosecutorial vindictiveness." 718 F.2d at 1362. In those circumstances, the Court of Appeals commented:

> If the defendant challenges as vindictive a prosecutorial decision to increase the number or severity of charges following a successful appeal, the court must examine the prosecutor's actions in the context of the entire proceedings. *If any objective event or combination of events in those proceedings should indicate to a reasonable minded defendant that the prosecutor's decision to increase the severity of charges was motivated by some purpose other than a vindictive desire to deter or punish appeals, no presumption of vindictiveness is created.* In trying the issue of vindictiveness, *the prosecutor may offer proof of* the sort suggested in *Hardwick* [*v. Doolittle*, 558 F.2d 292 (5th Cir. 1977), *cert. denied*, 434 U.S. 1049, 98 S.Ct. 897, 54 L.Ed.2d 801 (1978)] that as a matter of fact his actions were not vindictive. The burden of proof (by a preponderance of the evidence) remains on the defendant who raised the affirmative defense. If, on the other hand, the course of events provides *no objective indication* that would allay a reasonable apprehension by the defendant that the more serious charge was vindictive, i.e., inspired by a determination to "punish a pesky defendant for exercising his legal rights," a presumption of vindictiveness applies which cannot be overcome unless the government proves by a preponderance of the evidence that events occurring since the time of the original charge decision altered that initial exercise of the prosecutor's discretion.

Id. at 1365 (emphasis added). *Krezdorn*, then, was a case in which the burden of proof had already shifted, and the prosecutor's failure to come forward at that point and explain his conduct would have prejudiced the prosecution.

command is not enough to disqualify him from forwarding cases to the institution created for the very purpose of vindicating unjustly charged servicemembers – the court-martial. If it were otherwise, very few serious offenses could ever be prosecuted, a result not consistent with logic. Significantly, there has been no suggestion that the convening authority's supposed attitude toward appellant or the offenses was communicated to the court members or otherwise tainted the proceedings.[6]

The decision of the United States Army Court of Military Review is affirmed.

SULLIVAN, Judge (concurring):

The conduct of the convening authority in this case and other cases deeply troubles this Court. *See United States v. Thomas*, 22 M.J. 388 (C.M.A.1986). Accordingly, it is appropriate within the context of the case at bar to give some guidance on this officer's role in the military justice system.

The actions a convening authority takes in performing duties with regard to the administration of our military justice system constitute a solemn and sacred exercise of power. *Id.* at 400. That is one reason why it is a criminal offense under the Code not only to unlawfully influence the actions of a court-martial but also the action of a convening, approving, or reviewing authority. Arts. 37 and 98. Uniform Code of Military Justice, 10 U.S.C. §§ 837 and 898, respectively. The power to bring or to dismiss criminal charges against a servicemember must be exercised strictly in accordance with the law. *See Cooke v. Orser*, 12 M.J. 335, 338 (C.M.A.1982).

A convening authority must be impartial and independent in exercising his authority under the Code. The very perception that a person exercising this awesome power is dispensing justice in an unequal manner or is being influenced by unseen superiors is wrong. We must insure our system of justice is free from even the appearance of command influence. *See generally United States v. Brice*, 19 M.J. 170, 172

---

[6] I agree with the opinion of my Brother, Judge Sullivan.

n. 3 (C.M.A.1985) (principal opinion); *United States v. Rosser*, 6 M.J. 267, 273 n.19 (C.M.A.1979).

In the case at bar, a perception might exist that appellant and a fellow servicemember involved in the same criminal investigation received unequal treatment. However, on closer examination, we find this perception is wrong. The record shows that the convening authority properly exercised his powers by charging appellant with a crime and accepting the resignations of others. However, it would have been better from a perception standpoint if the convening authority had recused himself in the case of his former personal aide and transferred his court-martial powers to another competent convening quthority. Art. 22(b), UCMJ, 10 U.S.C. § 822(b). *See* R.C.M. 401 (c), Manual for Courts-Martial, United States, 1984.

Furthermore, in the case at bar the convening authority made breakfast remarks to noncommissioned officers concerning the pending case. The record clearly demonstrates that there was no prejudice to appellant resulting from this incident. However, this incident would not have been an appellate issue if the convening authority had not commented on this pending case. There is a good reason why Supreme Court justices, federal prosecutors, jurors, judges, courts-martial members, and others intimately involved with the administration of justice answer "no comment" when they are asked for their views on a pending case. A.B.A. Standards, *Fair Trial and Free Press* §§ 8-1.1 to 8-2.3 (1978). Similarly, public comments on a pending case by a convening authority to the press or to subordinate members of his command can only serve questionable purposes and could prejudice an accused in some situations.

This Court also notes that one of the true cornerstones of the fair system of justice that our servicemembers enjoy is the independence of the convening authority. His honor, professionalism, and integrity guarantee fairness and openness in the exercise of the courts-martial power. A frequent observer of the system knows that, when the convening authority makes a decision exercising power in this area, there are no unseen strings or superiors influencing his actions. Moreover, to influence a convening authority's exercise

of power by exerting influence from a superior or on a superior's behalf either directly or indirectly is to violate the law. Arts. 37 and 98. A convening authority has to decide a case without any suggestion as to how the superior wants the case to be resolved. Art. 34, UCMJ, 10 U.S.C. § 834. If the superior of a convening authority wants to properly influence the outcome of a criminal case, let that superior operate in the open and under the law by assuming the power of the court-martial convening authority under Article 22.

Likewise, no indirect pressure to influence the convening authority's action should be exerted from above through legal channels. The convening authority may seek legal advice through his assigned legal advisor or through superior legal officers including the Judge Advocate General. Art. 6(b), UCMJ, 10 U.S.C. § 806(b). But let only legal advice, not policy suggestions, from the convening authority's superior flow through these channels.

Command influence is a threat to justice and fairness in the operation of the code. This evil can emanate from within or outside the system. The most obvious case is where the convening authority taints the proper operation of the courts-martial system in his command by exerting influence outside the scope of his authorized power. *See United States v. Thomas, supra.* Command influence can also come from above and improperly impact on the decision of the convening authority himself. *See generally* H. Moyer, *Justice and the Military* §§ 3-111 to 3-113, 3-136, 3-137 (1972). Neither form can be tolerated.

A typical general or flag officer exercising convening-authority power will almost always have superiors, higher-ranking military officers or civilians in policy positions. These superiors as well must refrain from sending signals down the chain of command as to expected results in a criminal case. Real or perceived policy considerations in the operation of military departments have no place in determining the guilt or innocence of an individual charged with a crime under the laws of our land. Superior commanders and staff officers, as well as military or civilian legal officers, must never, directly or indirectly, interfere with a convening authority's exercise

of his lawful duty. The convening authority must make his or her own decision on the case. It is not only unprofessional but a fraud on the system for a superior to "send the word" down to a convening authority as to a desired result in a criminal case which will please the leadership of our armed forces.

EVERETT, Chief Judge (concurring):

I concur with the principal opinion as well as with Judge Sullivan's excellent concurring opinion.

APPENDIX B

UNITED STATES COURT OF MILITARY REVIEW

Before
WOLD, FELDER, and NAUGHTON
Appellate Military Judges

CM 445028

UNITED STATES, APPELLEE,

v.

MASTER SERGEANT CHAD S. HAGEN, 536-42-6084,
UNITED STATES ARMY, APPELLANT.

US Army Infantry Center and Fort Benning
R.L. Lurker, Military Judge

Lieutenant Colonel Arthur L. Hunt, JAGC, Major Robert M. Ott, JAGC, Captain Peter L. Yee, JAGC, Captain Donna C. Maizel, JAGC, and Captain Joel R. Maillie, JAGC, were on the pleadings for appellant.

Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, Major Thomas J. Leclair, JAGC, Captain Robert C. Erickson, JAGC, Captain Andrew D. Stewart, JAGC, and Captain John F. Burnette, JAGC, were on the pleadings for appellee.

---

25 June 1985

MEMORANDUM OPINION

FELDER, Judge:

While pending trial by general court-martial at Fort Benning, Georgia, for larceny, sale, attempted sale, and con-

spiracy to sell government explosives and ammunition, the appellant was diagnosed by a court-ordered sanity board as suffering from chronic post-traumatic stress disorder which, according to the diagnosis, might have affected his ability to appreciate the criminality of his conduct and ability to conform his conduct to the requirements of the law. He was evaluated, however, as possessing sufficient mental capacity to understand the nature of the proceedings against him and to conduct or cooperate intelligently in his defense.

Based upon these psychiatric conclusions, the request of a co-accused lieutenant to resign for the good of the service was approved because the appellant was the principal witness against him. In addition, the acting staff judge advocate recommended that charges be dismissed against the appellant. The convening authority, however, rejected the recommendation to terminate the proceedings against the appellant. The appellant subsequently engaged at his expense a civilian psychiatrist with special training in dealing with post-traumatic stress disorder. He, too, diagnosed the appellant as suffering from the disorder.

After the government presented its evidence on the merits of the case, the appellant and his attorneys decided not to present any evidence despite prior assurance to the court that the issue of mental responsibility would be raised and litigated. Instead, during the presentencing proceedings, among other evidence, the stipulated testimony of the civilian psychiatrist was presented. His testimony related that the appellant appeared to have had some type of emotional difficulty for many years. He stated that the appellant suffered from post-traumatic stress disorder as manifested by recollections of traumatic events which occurred in Vietnam, intensification of symptoms in response to events that resemble events in Vietnam, hyperalertness, episodes of blackout or memory impairment, severe headaches, alcohol abuse and impairment of judgment under pressure. He concluded that "the effects of his [appellant's] post-traumatic stress disorder on his criminal behavior is undoubted. However, such behavior is multiple-determined and other motives for this behavior are unclear."

Next to testify was the Department of the Army civilian psychiatrist who constituted the court-ordered sanity board. His testimony paralleled that of the other psychiatrist. He evaluated the appellant as suffering from post-traumatic stress disorder, which is a mental disorder according to the Diagnostic and Statistical Manual of Mental Disorders, third edition, released in 1980 by the American Psychiatric Association. He testified that appellant's symptoms included reexperiencing traumatic events of Vietnam, hyperalertness, nightmares, headaches, insomnia, irritability, estrangement from reality and alcoholism. He also found that the appellant has a personality disorder that caused him significant distress in adapting to his environment.

After conclusion of the presentencing proceedings, the military judge sentenced the appellant to a bad-conduct discharge, confinement at hard labor for thirty months, total forfeitures and reduction to Private E-1. After the trial, defense counsel requested the convening authority to order a sanity board to evaluate the appellant's mental capacity because he could "not recall the court-martial in total and has no recollection of testifying nor of our decision to forego the Vietnam Delayed Stress Disorder defense on the case in chief." This request was denied.

At the United States Disciplinary Barracks, a preliminary psychiatric evaluation found "there appears to be a very strong likelihood that [appellant] does have a significant neuro-pyschological impairment, which has contributed to his long standing symptoms, and may have had a significant bearing on his confining offense, as well as his competency to stand trial." This Court then granted the appellant's motion for a post-trial sanity board. That board submitted a report with the following unanimous findings:

> a. The appellant, at time of trial, did not *appear to* possess sufficient mental capacity to understand the nature of the proceedings against him and was unable to conduct or cooperate intelligently in his defense. He states he does not remember the proceedings or court martial & was suffering with severe headaches. He was recently evaluated & diagnosed as having migraine

headaches. He was placed on medication with little or no recurrence of headaches and or frequent loss of temper.

b. The appellant, at present time does possess sufficient mental capacity to understand the nature of the proceedings against him and can intelligently conduct or cooperate in his appeal. [Emphasis added].

The appellant now contends that the latest sanity board report, coupled with the evidence adduced at trial, proves convincingly that he lacked the mental capacity to stand trial. The relief he requests is that the findings of guilty and the sentence be set aside and a rehearing authorized.

The question before this Court is whether the appellant possessed sufficient mental competence to understand the nature of the trial proceedings against him and to cooperate intelligently in his defense. Paragraph 120*d*, Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as MCM, 1969 (Rev.)] (amended by Change 3, 1 Sep. 1984). We are satisfied that there is sufficient evidence in the record to answer this question; therefore, no further inquiry into his mental condition is necessary and we may finally resolve the appellant's post-conviction claim of insanity, *United States v. Roberts*, 18 M.J. 192, 195 (CMA 1984) (Everett, C.J., concurring in the result), as an interlocutory question, *United States v. Jacks*, 25 C.M.R. 78 (CMA 1958). If there is no reasonable doubt as to the competence of the appellant to stand trial, the findings of guilty may be affirmed. If a reasonable doubt exists, a rehearing may be authorized. Paragraph 124, MCM, 1969 (Rev.); *United States v. Triplett*, 45 C.M.R. 271 (CMA 1972).[1]

The appellant's claim of incompetence is based primarily on his present inability to recall all of the trial proceedings, to recall testifying at trial, or to recall his participation in the decision not to raise the issue of insanity at trial. We note first that we are concerned in the case at bar with the appellant's mental condition during his trial, not his present

---

[1] Rule for Courts-Martial 909(c), Manual for Courts-Martial, United States, 1984, has changed the standard for the interlocutory issue of mental capacity to a preponderance of the evidence.

ability to recall his trial. Secondly, even a loss of memory at the time of trial does not necessarily indicate an inability to cooperate rationally in one's defense. A person may well forget certain events and yet be able to deal with them rationally, to cooperate with his counsel, and to remember that which takes place at the trial itself. *United States v. Olvera*, 15 C.M.R. 134 (CMA 1954). Thirdly, in evaluating appellant's capacity to stand trial, we must consider not only psychiatric reports but also the complete record of trial, including the appellant's behavior throughout the proceedings. *Cf. United States v. Mulhern*, 45 C.M.R. 281 (CMA 1972).

Appellant is a twenty-year Army vereran who in 1963-64 flew over four hundred missions in Vietnam as a helicopter gunner. He was wounded in combat three times. Two sanity boards and a civilian psychiatrist agree that, at the time of trial, he was suffering from post-traumatic stress disorder. We agree with this conclusion. Typically, an individual afflicted with this disorder exhibits several of the following symptoms: anger, apathy, anxiety, alienation, cynicism, denial, depression, defensiveness, emotional numbness, fear, flashbacks, guilt, hyperalertness, impatience, insomnia, inability to concentrate, memory impairment, lethargy, mistrust, repression, regression, recurring dreams and nightmares, repetition, compulsion or repetitive tendencies, psychological statis, sleep disorders, social inversion, and withdrawal.[2]

The appellant was apprehended on 14 July 1982 for the offenses of which he was convicted. On that date, he made a confession detailing how he had conspired to sell grenades and ammunition over a four-and-a-half-month period to an agent with the Bureau of Alcohol, Tabacco and Firearms, United States Treasury Department. Further, in the confession the appellant discussed the following: how he obtained the grenades and ammunition; how the inert hand grenades were made explodable; the nomenclatures and model num-

---

[2] *See* Am. Psych. Ass'n, Diagnostic and Statistical Manual of Mental Disorders 236-38 (3d ed. 1980). For further comment and sources regarding this condition and its legal ramifications, *see generally* Menefee, *The "Vietnam Syndrome" Defense: A "G. I. Bill of Criminal Rights?"*, The Army Lawyer, Feb. 1985, at 4.

bers of weapons; the number of rounds and grenades involved in the criminal enterprise; and the amount of money he received. He also disclosed that his motive for committing the crime was profit.

The officer who conducted the formal investigation under Article 32, Uniform Code of Military Justice, 10 U.S.C. § 832, reported that there were no reasonable grounds for inquiring into the mental capacity of the appellant at the time of the investigation. The staff judge advocate informed the convening authority in the pretrial advice that there was no reason to believe that the appellant may have been either mentally defective or deranged. Therefore, the case was initially referred to trial without the benefit of a psychiatric report. Two pretrial sanity evaluations were conducted on the appellant. Neither questioned his mental capacity to stand trial.

The trial commenced on 29 November 1982. Sessions were held intermittently until it concluded on 3 August 1983. As in *United States v. Mulhern*, 45 C.M.R. at 282, at the first session the appellant responded directly and appropriately to questioning by the military judge as to his understanding of the right to counsel and to trial by military judge alone, which he had elected. The testimony of both of the psychiatrists who had evaluated the appellant was received at trial; again, neither questioned the appellant's competence to stand trial. The appellant also testified in his behalf. He reviewed his entire military career, including his experiences in Vietnam. He testified about his memory lapses, headaches, nightmares and drinking habits over the years as well as his relationship with his family. He stated that he was sorry for what he had done and for the effect it had on the Non-Commissioned Officer Corps. The appellant's testimony was coherent and reflected an unimpaired ability to recall the past and respond rationally to the present. The appellant was represented by both military and civilian defense counsel. No one, including defense counsel, questioned the appellant's competence to stand trial from the time of apprehension to completion of the court-martial.

Opposing this impressive body of evidence that the appellant was competent to stand trial, we have the unanimous finding of the post-trial sanity board that the appellant was incompetent and the fact that he suffered from post-traumatic stress disorder. The persuasiveness of the board's finding as to competence is diminished by the fact that the finding is somewhat equivocal and the fact that the board was hampered by having to evaluate the appellant more than a year after the conclusion of the trial. Moreover, the effect of this evidence is to create a dispute between the experts who have observed and evaluated the appellant. Given the variable symptomatology associated with post-traumatic stress disorders and the symptoms ascribed to the appellant's case, we can attach little weight to the mere fact that the appellant suffered from that disorder. Having carefully weighed all of the evidence, we are convinced beyond a reasonable doubt that the appellant possessed the mental capacity to stand trial.

The remaining assigned error and those personally raised by the appellant have been considered and determined to be without merit.

The findings of guilty and the sentence are affirmed.

Senior Judge WOLD and Judge NAUGHTON concur.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.
William S. Fulton, Jr.
Clerk of Court

APPENDIX C

DISPOSITION FORM

REFERENCE OR OFFICE SYMBOL
ATZB-JA

Subject
Withdrawal of Charges re: MSG Chad S. Hagen, 536-42-6084

To Cdr, USAIC From SJA

Date 21 APR 1983 CMT 1
CPT Montecalvo/pw/5-3185

1. *PURPOSE*: To advise the Commanding General of the appropriate action to take in the case of *United States v. MSG Chad S. Hagen*, Company A, Infantry Training Group, US Army Infantry Training Center, Fort Benning, Georgia.

2. *FACTS*: a. The accused is currently pending trial by general court-martial for one specification of larceny, in violation of Article 121, UCMJ; eight specifications of wrongful sale of Government property, in violation of Article 108, UCMJ; one specification of conspiracy, in violation of Article 81, UCMJ; and one specification of attempted sale of Government property, in violation of Article 80, UCMJ. The charge was referred to trial on 7 January 1983 and is at TAB A.

b. Subsequent to referral, MSG Hagen was examined by a military psychiatrist at Martin Army Community Hospital. He was diagnosed as suffering from post-traumatic stress disorder (chronic). The accused was also examined by a civilian psychiatrist who further concluded that the accused suffered from a mental disease, as previously diagnosed, and as a result lacks the substantial capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law. Both psychiatric reports are at TAB B.

3. *DISCUSSION*: a. Paragraph 56*a*, Manual for Courts-Martial, United States, 1969 (Revised edition), provides that the convening authority may properly withdraw a specification or an entire case from the consideration of any court for any reason.

b. The Government has the burden of proving beyond a reasonable doubt that the accused in fact had the requisite capacity to appreciate the criminality of his conduct and conform such conduct to the requirements of the law. No psychiatric examinations conducted on the accused indicate that he had the required mental capacity. The accused is continuing to undergo psychiatric treatment through the Army.

c. The defense has requested Government funds in the amount of $3,000.00 for the employment of the civilian expert witness who had examined the accused. Additionally, the accused pursuant to Paragraph 115, Manual for Courts-Martial, United States, 1969 (Revised edition) has requested several material, out-of-state witnesses, who would have to be provided at Government expense.

d. Based upon the lack of evidence sufficient to prove the accused sane beyond a reasonable doubt and the expense the Government would incur by proceeding to trial, it is my opinion that the Charges should be withdrawn and dismissed. COL Lasseter concurs with this opinion.

4. *RECOMMENDATION*: I recommend that you withdraw and dismiss the Charges now pending against MSG Hagen and referred for trial to Court-Martial Convening Order Number 157, dated 1 January 1983. An action to accomplish this is at the Signature TAB.

/s/ JOHN B. ADAMS
John B. Adams
LTC, JAGC
Acting Staff Judge Advocate

2 Encl
as

APPENDIX D

UNITED STATES

v.

CHAD S. HAGEN

MOTION TO DISMISS

The accused, CHAD S. HAGEN, by and through the undersigned, moves this Court for an order dismissing the charges against him in the above-entitled matter.

This motion is made on the grounds of prosecutorial misconduct and prosecutorial vindictiveness, to-wit: The convening authority has conspired with certain parties to insure that the accused is improperly, falsely and maliciously prosecuted.

Some of the acts which give evidence to said prosecutorial vindictiveness on behalf of the convening authority are as follows:

1. Allowing Lt. Scott Johnston to be dismissed from the United States Army " for the good of the service," and not be prosecuted for the offenses which he committed, while expressly ordering the prosecution of the accused for some of the identical acts.

2. Refusing to dismiss the charges brought against the accused upon the advice and counsel of the Staff Judge Advocate.

3. Failing to authorize the employment of a psychiatrist to evaluate the accused, thereby causing the accused to spend personal funds to pay for an evaluation by a psychiatrist who is an expert in the diagnosis and treatment of Post Traumatic Stress Disorder.

4. Refusing to meet with counsel for the accused.

5. Hand-picking a jury panel to try the accused.

6. Attempting to exercise command influence over prospective members of the panel from which the jury is to be selected. An example of this occurred at a breakfast meeting

of E-8's and above at which the convening authority stated in substance as follows: "Master Sergeant Hagen will be prosecuted. The Army has spent over $10,000.00 in preparing this case, and Master Sergeant Hagen will be prosecuted."

7. Said action and other actions clearly indicate a deliberate course of conduct amounting to actual prosecutorial misconduct and vindictiveness, and is unlawful, illegal and unconstitutional and requires a dismissal of all charges against the accused.

This motion is based on all the files and records in this action and any evidence adduced at a hearing on this motion.

SWEARINGEN, CHILDS & PHILIPS, P.C.

By: /s/ JOHN C. SWEARINGEN, JR.

C. Douglas Goins
Defense Trial Counsel

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by hand delivery or depositing in the United States Mail, a copy of the same in a properly addressed envelope with adequate postage thereof.

This 26 day of May, 1983.

/s/ DOUGLAS GOINS
Attorney for

APPENDIX E

DISPOSITION FORM

REFERENCE OR OFFICE SYMBOL
ATZB-JA

Subject
Resignation for the Good of the Service,
1LT Scott L. Johnston, 202-50-9970

To Acting Cdr, USAIC From SJA

Date 24 NOV 1982 CMT 1
CPT Young/ww/5-3285

1. *PURPOSE*: To advise the Acting Commander of the appropriate action to be taken concerning a Resignation for the Good of Service submitted under the provisions of chapter 5, AR 635-120, by 1LT Scott L. Johnston, Company A, Infantry Training Group, Fort Benning, Georgia. The Resignation for the Good of the Service is at TAB A.

2. *FACTS*: a. The accused has been charged with one specification of larceny in violation of Article 121, UCMJ, one specification of conspiracy in violation of Article 81, UCMJ; five specifications of conduct unbecoming an officer and a gentleman in violation of Article 133, UCMJ; two specifications of unlawful making of a destructive device, and one specification of unlawful possession of hand grenades all in violation of Article 134, UCMJ. The charges and specifications are at TAB B.

b. The available evidence indicates that the accused conspired with MSG Chad S. Hagen to steal assorted Government ammunition, and manufacture destructive devices for the purpose of selling said property for profit and gain.

c. 1LT Johnston is 24 years old and is married. He has 16 years of formal education and has no record of any civilian

convictions. 1LT Johnston was commissioned as a 2LT, USAR, in the Infantry Corps in 1980. He has been awarded the Army Service Ribbon.

d. On 10 September 1982, an Article 32 investigation was held. The Article 32 Investigation and Advice of the Staff Judge Advocate are at TAB C.

3. *DISCUSSION*: a. 1LT Johnston submitted the attached Resignation for the Good of the Service on 22 Oct 1982. The resignation has been reviewed consistent with the requirements of Chapter 5, AR 635-120, and is legally sufficient.

b. AR 635-120, provides that a Resignation for the Good of the Service will be routed to the general court-martial convening authority through the same channels as court-martial actions, and that each subordinate commander will make a recommendation for approval or disapproval and type of discharge to be issued by indorsement. The commander exercising general court-martial jurisdiction will then forward the resignation, along with his recommendation and the recommendations of the subordinate commanders directly to Headquarters, Department of the Army. The general court-martial convening authority will also state in his forwarding indorsement whether he does or does not intend to proceed with the trial of the pending court-martial charges.

c. 1LT Johnston's commanders have recommended that his resignation be approved and that he be separated with a Discharge Under Other than Honorable Conditions. The recommendations of the accused's commanders are at TAB D.

d. I concur with the recommendations of 1LT Johnston's commanders. The evidence indicates that the accused did conspire with MSG Chad S. Hagen to sell Government property for profit and gain. However, the main witness in this case will be the co-accused, MSG Chad S. Hagen. A Sanity Board conducted at Martin Army Community Hospital has determined that MSG Hagen, at the time of the alleged offense, may have lacked the capacity to appreciate the criminality of his conduct. The Sanity Board Findings are at TAB E. It is my belief that the credibility of his testimony will

be severely affected by this disclosure, possibly resulting in a not guilty finding in the case of *U.S. v. 1LT Scott L. Johnston*. Furthermore, MSG Hagen has requested an additional psychiatric examination. The request is at TAB F. The delay caused by this evaluation could result in dismissal of the charges against 1LT Johnston if the accused demands a speedy trial.

e. 1LT Johnston's conduct between 17 March 1982 and 15 July 1982 shows a serious lack of integrity and is of a nature to bring discredit upon Fort Benning, the Officer Corps, and the United States Army. His actions clearly show that he is unfit to continue as an officer in the United States Army.

4. *RECOMMENDATIONS*: I recommend that you recommend approval of 1LT Johnston's Resignation for the Good of the Service and the issuance of a Discharge Under Other Than Honorable Conditions. In light of the fact that this resignation has been submitted, I also recommend that you direct that any further actions with regard to the court-martial charge against 1LT Johnston be held in abeyance pending final action on his resignation. An action to accomplish your determination of the matter is at the Signature TAB.

/s/ JOHN B. ADAMS
John B. Adams
LTC, JAGC
Acting Staff Judge Advocate

6 Incl
as

U.S. GOVERNMENT PRINTING OFFICE: 1987—196 240 62009

Supreme Court, U.S.
FILED
JAN 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-833

In the Supreme Court of the United States

OCTOBER TERM, 1987

CHAD S. HAGEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

NORMAN G. COOPER
Col., JAGC, USA

GARY F. ROBERSON
Lt. Col., JAGC, USA

GARY L. HAUSKEN
Capt., JAGC, USA

PATRICK D. O'HARE
Capt., JAGC, USA

GEORGE R. GILLETTE
Capt., JAGC, USA
Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency
Falls Church, VA 22041-5013

18 pp

QUESTION PRESENTED

Whether petitioner was entitled to pursue discovery on his claim that the government selectively or vindictively refused to dismiss the pending charges against him.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Ake v. *Oklahoma*, 470 U.S. 68 (1985)	11
Blackledge v. *Perry*, 417 U.S. 21 (1974)	13
Lane v. *Lord*, 815 F.2d 876 (2d Cir. 1987)	13
Thigpen v. *Roberts*, 468 U.S. 27 (1984)	13
United States v. *Andrews*, 633 F.2d 449 (6th Cir. 1980), cert. denied, 450 U.S. 927 (1981)	13
United States v. *Berrigan*, 482 F.2d 171 (3d Cir. 1973)	8
United States v. *Berrios*, 501 F.2d 1207 (2d Cir. 1974)	8
United States v. *Cammisano*, 546 F.2d 238 (8th Cir. 1976)	9
United States v. *Crocker*, 788 F.2d 802 (1st Cir. 1986)	13
United States v. *Erne*, 576 F.2d 212 (9th Cir. 1978)	8
United States v. *Falk*, 479 F.2d 616 (7th Cir. 1973)	8
United States v. *Goodwin*, 457 U.S. 368 (1982)	12-13
United States v. *Gordon*, 817 F.2d 1538 (11th Cir. 1987)	8
United States v. *Guthrie*, 789 F.2d 356 (5th Cir. 1986)	13
United States v. *Hazel*, 696 F.2d 473 (6th Cir. 1983)	8
United States v. *Meyer*, 810 F.2d 1242 (D.C. Cir. 1987), petition for cert. pending, No. 87-730	13
United States v. *Murdock*, 548 F.2d 599 (5th Cir. 1977)	8
United States v. *Oliver*, 787 F.2d 124 (3d Cir. 1986)	13
United States v. *Partyka*, 561 F.2d 118 (8th Cir. 1977), cert. denied, 434 U.S. 1037 (1978)	13
United States v. *Schmucker*, 815 F.2d 413 (6th Cir. 1987)	8
United States v. *Valenzuela-Bernal*, 458 U.S. 858 (1982)	7

Constitution, statutes, and regulations: Page

U.S. Const. Amend. VI (Compulsory Process Clause) . . . 7, 8
Uniform Code of Military Justice, 10 U.S.C. (& Supp. IV) 801 *et seq.*:
Arts. 22-24, 10 U.S.C. (& Supp. IV) 822-824 2
Art. 25, 10 U.S.C. (& Supp. IV) 825 2-3
Art. 34, 10 U.S.C. (& Supp. IV) 834 2-3
Art. 60, 10 U.S.C. (& Supp. IV) 860 2-3
Art. 80, 10 U.S.C. 880 1-2
Art. 81, 10 U.S.C. 881 ..... 1, 2, 3
Art. 108, 10 U.S.C. 908 ..... 1-2, 3
Art. 121, 10 U.S.C. 921 1-2
Art. 133, 10 U.S.C. 933 3
Art. 134, 10 U.S.C. 934 3
Dep't of the Army Reg.:
Reg. 635-120 (Aug. 1, 1982):
Ch. 1, para. 1-3(b) 3
Ch. 2, para. 2-3 3
Ch. 5 3
Para. 5-2 3
Reg. 635-200, ch. 10 (Oct. 1, 1982) 9

Miscellaneous:

Manual for Courts-Martial, United States – 1984:
R.Courts-Martial:
Rule 503 3
Rule 504 2
Rule 601 3
Rule 707(a) 10
Rule 1107 3

BEST AVAILAB

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-833

CHAD S. HAGEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-18a) is reported at 25 M.J. 78. The opinion of the Army Court of Military Review (Pet. App. 19a-25a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 25, 1987. The petition for a writ of certiorari was filed on November 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Fort Benning in Georgia. He was convicted of larceny, the wrongful sale of military property, conspiracy, and the attempted sale of military property, in violation of Articles 80, 81, 108, and

LE COPY

121 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880, 881, 908, and 921. The Army Court of Military Review affirmed the findings and sentence (Pet. App. 19a-25a). Upon discretionary review, the Court of Military Appeals affirmed (Pet. App. 1a-18a).

1. On four occasions in 1982, petitioner, an Army master sergeant with 18 years of service, sold 38 explosive hand grenades he had stolen at Fort Benning to undercover agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF) (Pet. App. 3a; Tr. 197-198; GX 2). Petitioner, who believed that the ATF agents were connected with the Mafia, had told one of the undercover agents that he was in charge of a weapons range at Fort Benning and that he could provide them not only with explosives, but also with firearms and ammunition (Tr. 181, 200; GX 18).[1] Petitioner confessed that he stole about 75 practice "inert" hand grenades and other military items from the government (GX 18). In collaboration with Lieutenant Scott Johnston, petitioner converted the stolen grenades into live explosives (*ibid.*). Petitioner was arrested on July 14, 1982, while attempting a fifth sale (Pet. App. 3a; Tr. 197-198).

2. The convening authority was Major General Wetzel.[2] On August 18, 1982, General Wetzel, in accord-

---

[1] Petitioner also transferred more than 4500 rounds of small caliber ammunition to an ATF agent (Tr. 175, 177, 178, 180, 183), a matter for which he was not prosecuted.

[2] A "convening authority" is a commander who is authorized to convene a court-martial pursuant to Articles 22-24 of the UCMJ, 10 U.S.C. (& Supp. IV) 822-824, and Rule for Courts-Martial 504, *Manual for Courts-Martial, United States—1984* [hereinafter *Manual*]. The duties of the convening authority include the selection and appointment of court-martial panel members (a practice commonly known as "detailing" members of a court-martial), directing that the accused be tried by the court-martial for the charged offenses (a practice commonly known as the "referral" of charges to a court-martial), and a post-trial review of the proceedings. See Arts. 25, 34,

ance with the advice of his staff judge advocate, referred the charges against petitioner for trial (Pet. App. 5a). Subsequently, the defense requested that a medical board be convened to evaluate petitioner's mental condition; the government concurred and the trial judge ordered the inquiry (*ibid.*; AX 1). On November 4, Dr. Gerson Escondo, the government psychiatrist who conducted the inquiry, reported that "at the time of [the] alleged offense, as a result of post-traumatic stress disorder, [petitioner] might lack the capacity to appreciate the criminality of his conduct * * * [and] might lack the capacity to conform his conduct to the requirement of the law" (AX 2). Dr. Escondo concluded, however, that petitioner was competent to stand trial (*ibid.*; Pet. App. 5a).

Lieutenant Johnston was also apprehended and charged with conspiracy, larceny, conduct unbecoming an officer and a gentleman, unlawfully possessing hand grenades, and unlawfully making destructive devices, in violation of Articles 81, 121, 133, and 134, UCMJ, 10 U.S.C. 881, 921, 933, and 934 (AX 30). On October 22, 1982, Lieutenant Johnston submitted a request to resign "for the good of the service." See Dep't of the Army Reg. 635-120, "Personnel Separations, Officer Resignations and Discharges," ch. 5 (Aug. 1, 1982); Pet. App. 31a. On November 24, General Wetzel's legal advisor, the acting staff judge advocate, advised General Wetzel to recommend approval of Lieutenant Johnston's resignation request (Pet. App. 31a).[3] The legal advisor noted that petitioner was

---

and 60, UCMJ, 10 U.S.C. (& Supp. IV) 825, 834, and 860; see also Rules for Courts-Martial 503, 601, and 1107, *Manual*.

[3] When an officer submits a request to resign for the good of the service after charges have been brought against him, the convening authority must forward the request and his recommendation to the Department of the Army. The Secretary of the Army must thereafter approve the resignation request. Dep't of the Army Reg. 635-120, paras. 1-3(b), 2-3, 5-2 (Aug. 1, 1982).

the "main witness" in the case against Lieutenant Johnston and that, since petitioner's credibility could be severely affected by the sanity board's findings, the prosecution of Lieutenant Johnston could result in an acquittal. The legal advisor also observed that the delays resulting from the psychiatric evaluations in petitioner's case might prejudice Lieutenant Johnston's right to a speedy trial (*ibid.*). Lieutenant Johnston's chain-of-command also recommended that his resignation request be approved (*ibid.*). General Wetzel recommended that the Secretary of the Army grant the resignation request.[4]

Before trial, petitioner sought an additional psychiatric evaluation of his mental status (Pet. App. 6a; AXs 5, 8). Prior to the first session of petitioner's court-martial, the defense requested an examination by a specialist in the field of "Viet Nam Delayed Stress Syndrome," allegedly a type of post-traumatic stress disorder (AX 8). The government offered the services of another government psychiatrist who was not an expert in the area of post-traumatic stress disorder, because the government psychiatrists had concluded that there was no such area of psychiatric expertise (Tr. 17-19). The government indicated that it would comply with a court-ordered psychiatric examination, and the government offered to submit petitioner to a full examination to be conducted by the Chief of Psychiatry at the Fort Benning hospital (Tr. 19). The trial judge ruled that the government was not required to find an additional psychiatrist for the defense (Tr. 22), and the defense declined the government's offer (Pet. App. 6a-7a; Tr. 23).

Before the second session of the court-martial, petitioner requested that General Wetzel authorize the employment at the government's expense of Dr. Dave

---

[4] After his resignation from the Army, Lieutenant Johnston was prosecuted and convicted in federal district court (Pet. App. 6a n.4).

Davis, a psychiatrist who met petitioner's criteria. The cost of employing Dr. Davis was estimated to be $4,000 (AX 5). General Wetzel declined. Petitioner renewed his request to appoint Dr. Davis at the second session of the court-martial on December 15, 1982 (Tr. 26). The trial judge denied the request and ruled that the convening authority had not abused his discretion in not making petitioner's chosen psychiatrist available (Pet. App. 7a; Tr. 36).

The next court-martial session was not held until March 28, 1983 (Pet. App. 7a; Tr. 39). Defense counsel informed the trial judge that, during the interim, petitioner had raised $1,000 towards Dr. Davis's fee and had been examined by Dr. Davis (Tr. 39-41). The defense did not renew its motion for the appointment of Dr. Davis (*ibid.*). On March 31, Dr. Davis rendered a written opinion that petitioner lacked the substantial capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law at the time of the charged offenses (Pet. App. 7a; AX 8).

On April 21, General Wetzel's acting legal advisor told General Wetzel about Dr. Davis's opinion and recommended that the charges against petitioner be withdrawn (Pet. App. 26a). The legal advisor's recommendation was based on "a prosecutorial evaluation of the strength of the evidence (*i.e.*, of [petitioner's] sanity) and the projected costs" of further prosecution (*id.* at 7a). General Wetzel, however, declined to withdraw the charges (*ibid.*).

On April 27, relying on the advice of the acting staff judge advocate, General Wetzel denied petitioner's second request that the government pay Dr. Davis's fee (AXs 6, 7). At the next session of the court-martial, however, the government conceded that Dr. Davis had become an essential witness, and the government therefore did not object to producing him (Tr. 54). Nonetheless, the government did not agree that it should have to produce Dr. Davis at the rate arranged by petitioner (*ibid.*). The

trial judge did not specifically resolve the fee issue but ordered the government to produce Dr. Davis on penalty of abatement of the court-martial (Tr. 67). On June 20, the government informed the trial judge that Dr. Davis would testify (Tr. 93-94).[5]

3. On July 26, 1983, eleven months after the charges had been filed, the defense moved to dismiss the charges on the grounds of prosecutorial misconduct and vindictiveness (AX 29; Tr. 137-138). Petitioner requested that General Wetzel and David Rittenhouse (formerly Captain Rittenhouse) be ordered to appear as witnesses on the motion (Tr. 137-138, 151-152).[6] The trial judge denied petitioner's motion to produce the witnesses and denied his motion to dismiss the charges (Tr. 151-154).

4. The Court of Military Appeals affirmed (Pet. App. 1a-18a). It upheld the trial court's conclusion that peti-

---

[5] As it turned out, the defense rested without calling any witnesses (Tr. 342). At the sentencing hearing, however, petitioner presented Dr. Davis's testimony by way of stipulation (Tr. 384-388), and he presented live testimony from Dr. Escondo, the government psychiatrist who had first examined him (Tr. 392). After continued treatment of petitioner, Dr. Escondo came to share Dr. Davis's conclusion that petitioner suffered from post-traumatic stress disorder (Tr. 84) and he so testified (Pet. App. 8a; Tr. 393-394).

[6] The grounds for that motion (see AX 29) were that (1) General Wetzel permitted Lieutenant Johnston to resign, while requiring petitioner to stand trial; (2) General Wetzel declined to follow the advice of his staff judge advocate to dismiss the charges against petitioner; (3) General Wetzel refused to authorize the employment of Dr. Davis at the government's expense; (4) General Wetzel refused to meet with defense counsel; (5) General Wetzel selected the court-martial panel to hear the case against petitioner; (6) General Wetzel allegedly engaged in unlawful command influence by stating to subordinates that petitioner's prosecution would go forward. For purposes of the motion, the judge assumed the facts alleged by petitioner to be true (Tr. 153, 154).

tioner had failed to provide sufficient evidence to justify requiring the convening authority to defend his decision not to withdraw the charges against petitioner. The court also ruled that the record failed to show that the convening authority was vindictive or selective in his decisions in this case.

ARGUMENT

Petitioner contends that he should have been allowed to pursue discovery on the question why the charges against him were not withdrawn. Petitioner contends that he was the victim of selective prosecution, since the convening authority preferred charges against him but not against Lieutenant Johnston, who was allowed to resign. Petitioner also claims that the convening authority decided not to withdraw the charges against him in retaliation for his request to have Dr. Davis appointed as a defense psychiatrist. The Court of Military Appeals correctly found that petitioner did not make a sufficient showing to require the convening authority to explain why he declined to withdraw the charges against petitioner.

1. Petitioner contends that the Court should grant review to resolve an alleged conflict among the circuits regarding the standard of proof necessary before a defendant may pursue discovery on a claim of selective prosecution.[7] Petitioner maintains that the court below adopted

---

[7] Petitioner also claims (Pet. 12-14) that the trial judge's refusal to order General Wetzel to testify violated the Compulsory Process Clause. Petitioner did not rely on the Compulsory Process Clause at trial, however (AX 29; Tr. 137-151). He has therefore waived that claim. In any event, the Compulsory Process Clause has nothing to do with the correctness of an order denying a request for discovery. The denial of a request to introduce irrelevant evidence does not violate the Compulsory Process Clause (*United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)); *a fortiori*, the denial of a request to conduct discovery or to call a witness to testify before the court on a legal ques-

an unduly stringent standard in reviewing his pretrial discovery request. That claim does not warrant review by this Court, for several reasons.

First, although the courts of appeals have used different verbal formulations of the standard for determining whether a defendant is entitled to pursue discovery or to have a hearing on a claim of selective prosecution, any difference among these standards is entirely semantic, and the standard applied by the Court of Military Appeals is essentially the same as the one applied by all the federal courts of appeals. The Court of Military Appeals employed the standard enunciated in *United States* v. *Falk*, 479 F.2d 616 (7th Cir. 1973) (en banc), which requires the defendant to present " 'facts sufficient to raise a reasonable doubt about the prosecutor's purpose' " (Pet. App. 13a, quoting *United States* v. *Falk*, 479 F.2d at 620-621). The "reasonable doubt" standard is essentially the same as the test applied by other courts, which have characterized the standard as requiring the defendant to show a "colorable" basis for his claim (see *United States* v. *Gordon*, 817 F.2d 1538, 1540 (11th Cir. 1987); *United States* v. *Murdock*, 548 F.2d 599, 600 (5th Cir. 1977); *United States* v. *Berrigan*, 482 F.2d 171, 181 (3d Cir. 1973)); or "some evidence" to support the claim (see *United States* v. *Schmucker*, 815 F.2d 413, 418 (6th Cir. 1987); *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974)); or to make a nonfrivolous showing (see *United States* v. *Hazel*, 696 F.2d 473, 475 (6th Cir. 1983); *United States* v. *Erne*, 576 F.2d 212, 216 (9th Cir. 1978)). In fact, several of the courts have cited these formulations interchangeably, clearly indicating that they do not describe substantively different tests. See *United States* v. *Gordon*, 817 F.2d at 1540 (citation omitted) (describing a "colorable entitlement" for a selective prosecution claim as

---

tion does not violate the Compulsory Process Clause if the defendant has not laid a sufficient foundation to justify presenting the evidence.

"sufficient facts 'to take the question past the frivolous state and raise a reasonable doubt as to the prosecutor's purpose' "); *United States* v. *Cammisano*, 546 F.2d 238, 241 (8th Cir. 1976) (citing both *Berrios* and *Berrigan*). The difference in the formulations used by the different courts of appeals therefore does not reflect a difference in standards that warrants resolution by the Court.

In any event, petitioner has failed to show that this case would be decided differently under any circuit's rule. Petitioner's selective prosecution claim hinges on the allegedly disparate treatment received by his confederate, Lieutenant Johnston. Petitioner contends that Lieutenant Johnston was treated favorably by being allowed to resign, whereas petitioner was forced to stand trial for the same offenses. The short answer to petitioner's claim, however, is that unlike Lieutenant Johnston, petitioner never sought to resign even though he could have done so. Army regulations establish a procedure under which petitioner could also have requested a discharge for the good of the Army. Dep't of the Army Reg. 635-200, "Personnel Separations, Enlisted Personnel," ch. 10 (Oct. 1, 1982). That regulation is the functional equivalent of the regulation under which Lieutenant Johnston sought and received approval to resign. It provides that enlisted personnel charged with a crime punishable by a punitive discharge may request a discharge in lieu of a court-martial. Petitioner never made such a request, however, perhaps because a discharge for the good of the service may result in the loss of all military benefits. Petitioner cannot claim that he was selectively prosecuted when he could have sought the same treatment that was afforded his confederate, but did not do so. Since petitioner was responsible for any difference in the treatment he received, he cannot claim to be the victim of selective prosecution.

In addition, the facts on which petitioner relies to support his claim that he was treated unfairly (Pet. 9-10 n.6)

do not amount to a "colorable" claim that petitioner was the victim of selective or vindictive prosecution. First, petitioner claims that Captain Rittenhouse was implicated in the same crimes that formed the basis for the charges against petitioner, since Rittenhouse allegedly furnished Johnston with an automatic weapon that was later sold to the ATF agents (see Tr. 144). Rittenhouse was allowed to resign, petitioner claims, once the Army discovered that Rittenhouse had previously been an aide to and close friend of the convening authority. The Court of Military Appeals, however, found, that nothing in the record supported the suggestion that Rittenhouse was involved in any misconduct (Pet. App. 3a n.3). The Court of Military Appeals also found that, in statements made by petitioner but not admitted at trial, petitioner "himself provided the refutation of Rittenhouse's criminality" (*id.* at 10a) by suggesting that Rittenhouse merely sold petitioner a legal weapon and was not a party to petitioner's conversion of the weapon into an illegal, fully automatic weapon, or to petitioner's resale of the weapon to the ATF undercover agents (*id.* at 3a n.3).

Second, petitioner asserts that General Wetzel declined to prosecute Lieutenant Johnston on the ground that petitioner was mentally incompetent to testify, even though the evidence indicated that petitioner was competent. In actuality, the acting staff judge advocate advised the convening authority to approve Johnston's resignation request because of the legal advisor's concern about petitioner's *credibility*, not his *competency* (Pet. App. 31a; AX 30). Moreover, the legal advisor noted that Johnston's speedy trial right was in danger of being prejudiced due to the delays in petitioner's case,[8] and that Johnston's

[8] Petitioner was not brought to trial until eight months after Lieutenant Johnston submitted his resignation request. The government would have been required to bring Johnston to trial within 120 days of the preferral of charges against him. Rule for Courts-Martial 707(a), *Manual*.

chain-of-command had approved his resignation request. The Court of Military Appeals found that "[t]he reasons cited by the acting staff judge advocate * * * speak for themselves and are entirely justifiable" (Pet. App. 10a).

Third, petitioner asserts that the convening authority's decision not to follow the legal advisor's recommendation and withdraw the charges against him is evidence of an intent to retaliate against petitioner for requesting that Dr. Davis be appointed as a defense psychiatrist. The Court of Military Appeals rejected that claim, characterizing it as "patently absurd" (Pet. App. 12a). Petitioner assumes that the convening authority would have withdrawn the charges in the absence of his request for the appointment of Dr. Davis, but there is no basis for that assumption. At the time that General Wetzel's legal advisor recommended that the charges against petitioner be withdrawn because of Dr. Davis's conclusion that petitioner was insane, the convening authority also had substantial contrary evidence that petitioner was sane. The convening authority, therefore, did not act improperly by submitting that issue to an impartial factfinder. Indeed, as the Court of Military Appeals pointed out, the fact that the military judge who sat as the finder of fact found that petitioner was sane suggests that "[a]pparently the general had a better appreciation than did the acting staff judge advocate of just how impressive lay testimony about an accused's behavior can be" (*id.* at 13a). There was also nothing unreasonable about the convening authority's refusal to pay Dr. Davis's requested $4000 fee. Although petitioner had the right to the assistance of a psychiatrist, he did not have the right to select the expert of his choice and demand that the government pay whatever fee that expert charged. See *Ake* v. *Oklahoma*, 470 U.S. 68, 83 (1985). The government had already arranged to have petitioner examined by Dr. Escondo, and in response to petitioner's request for a further examination, the government offered petitioner

two other psychiatrists, including the chief of psychiatry at Fort Gordon, but petitioner declined the offers (Pet. App. 6a-8a).

Finally, petitioner relies on the convening authority's informal remark to some subordinates that the prosecution of petitioner was costly and would go forward. Even assuming that that remark was made (Pet. App. 9a, 11a-12a), it was objectively neutral and betrayed no animosity towards petitioner or his chosen defense. It was merely a statement by General Wetzel that he did not intend to withdraw the charges against petitioner—something that accurately described his actions in the case. To the extent that the statement suggests that the cost of the prosecution was a factor in General Wetzel's decision not to withdraw the charges, that may not have been the most appropriate justification for pursuing the case, but it did not reflect any invidious discrimination against petitioner.

The discovery standard applied by the Court of Military Appeals protects military commanders (and with them, military readiness) against "fishing expeditions" (Pet. App. 13a), while also affording a defendant the opportunity to prove that his prosecution stems from an improper discriminatory motive. Petitioner failed to make a sufficient showing in this case that discovery was necessary, and his fact-bound claim to the contrary does not warrant further review.

2. In discussing his claim of vindictive prosecution, petitioner challenges (Pet. 10-11) the Court of Military Appeals' ruling that a defendant must show that the convening authority acted with a vindictive intent. Petitioner contends that the ruling below conflicts with decisions of this Court and the other courts of appeals. That claim lacks merit. This Court has required a showing of actual vindictiveness when the prosecutor adds new charges before trial. *United States* v. *Goodwin*, 457 U.S. 368

(1982). That rule should also apply to a case like this one, in which the defendant claims that the prosecutor's decision not to withdraw previously filed charges is vindictive. Only when a prosecutor brings greater charges after a final judgment is entered has the Court allowed the defendant to rely on a presumption of vindictiveness. *Thigpen* v. *Roberts*, 468 U.S. 27 (1984); *Blackledge* v. *Perry*, 417 U.S. 21 (1974). That principle has no application to this case.[9] Accordingly, the Court of Military Appeals did not err by requiring petitioner to show actual vindictiveness in the convening authority's decision not to withdraw the charges.

---

[9] None of the lower court decisions cited by petitioner hold that the prosecutor's decision not to drop the charges against a defendant is presumptively invalid. *United States* v. *Crocker*, 788 F.2d 802 (1st Cir. 1986), involved the claim that the trial judge punished the defendant for standing trial. In the remaining cases, the prosecutor was alleged to have either brought new charges or increased the severity of charges vindictively. See *Lane* v. *Lord*, 815 F.2d 876 (2d Cir. 1987) (prosecutor filed an additional charge added after mistrial); *United States* v. *Meyer*, 810 F.2d 1242 (D.C. Cir. 1987), petition for cert. pending, No. 87-730 (prosecutor added new charge after defendants, who had been arrested for unlawfully demonstrating, chose to stand trial rather than forfeit collateral); *United States* v. *Oliver*, 787 F.2d 124 (3d Cir. 1986) (federal indictment brought after defendant, who was facing state prosecution, failed to cooperate with state authorities); *United States* v. *Guthrie*, 789 F.2d 356 (5th Cir. 1986) (substantive narcotics charges brought after defendant was acquitted of the charge of engaging in a continuing criminal enterprise involving some of the same conduct); *United States* v. *Andrews*, 633 F.2d 449 (6th Cir. 1980) (en banc) (prosecutor added new charge after bail granted to the defendant), cert. denied, 450 U.S. 927 (1981); *United States* v. *Partyka*, 561 F.2d 118 (8th Cir. 1977), cert. denied, 434 U.S. 1037 (1978) (prosecutor brought a narcotics distribution charge after the defendant's conviction on a drug possession charge was reversed on appeal). None of these cases stands for the proposition that the failure to dismiss properly filed charges constitutes a prima facie showing of vindictiveness entitling the accused to an evidentiary hearing prior to trial, the allegation on which petitioner's argument rests.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

NORMAN G. COOPER
Col., JAGC, USA

GARY F. ROBERSON
Lt. Col., JAGC, USA

GARY L. HAUSKEN
Capt., JAGC, USA

PATRICK D. O'HARE
Capt., JAGC, USA

GEORGE R. GILLETTE
Capt., JAGC, USA
Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency

JANUARY 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988 — 202-037/60249